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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 474

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

SEYMOUR H. KNOX

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 28, 1940
CERTIORARI GRANTED NOVEMBER 12, 1940

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INDEX

1 Before United States Board of Tax Appeals

Docket No. 77827

SEYMOUR H. KNOX, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket entries

Appearences: For Taxpayer—Ralph M. Andrews, Esq.; Dwight Taylor, Esq.; John L. Kenefick, Esq.; Ernest J. Brown, Esq. For Comm'r—B. M. Brodsky, Esq.; W. H. Schwatka, Esq.; E. L. Updike, Esq.

1934

Nov. 12—Petition received and filed. Taxpayer notified. (Fee paid.)
Nov. 12—Copy of petition served on General Counsel.

1935

Jan. 9—Answer filed by General Counsel.
Jan. 12—Copy of answer served on taxpayer.

2 1937

July 20—Motion for leave to file amended answer, amended answer lodged, filed by General Counsel.
July 20—Motion for circuit hearing at Buffalo, N. Y., filed by General Counsel.
July 22—Hearing set August 18, 1937, on motion.
July 24—Motion for leave to file amended answer granted.
Aug. 18—Hearing had before Mr. Mellott on motion of respondent to consolidate dockets 61658, 62811, 63186, 63245, 51, 64523, 64908, 10 to 15, 24, 65011, 24, 65202, 65393, 71815, 16, 77824, 27 & 28, 84639, 40, 41 & 42, and to deny his own motion for circuit hearing—granted. Motion filed at hearing.
Aug. 26—Hearing set November 1, 1937.
Sept. 1—Reply to amended answer filed by taxpayer. 9/3/37 copy served.
Sept. 4—Notice of the appearance of Dwight Taylor as counsel for taxpayer filed.

Sept. 4—Motion for continuance until after 1/1/38 filed by taxpayer. 9/7/37 granted to Spring of 1938.

Dec. 14—Notice issued placing proceeding on Washington, D. C., Calendar.

1938

Oct. 7—Hearing set Dec. 5, 1938.

Nov. 28—Motion for a continuance to Dec. 14, 1938, or on a date early in the month of January 1939, filed by taxpayer. 11/30/38 granted and continued to 12/14/38.

Dec. 14—Hearing had before Mr. Murdock on merits. Submitted. On motion of respondent to file amended answer—granted. Motion of petitioner to file amended reply—granted. Motion and amendment to amended answer filed. Motion and amended reply filed. Stipulation of facts filed. Appearance of John L. Kenefick, Ernest J. Brown filed.

Dec. 28—Transcript of hearing of Dec. 14, 1938, filed.

3 1939

Jan. 12—Brief filed by taxpayer. 1/12/39 copy served.

Jan. 26—Motion to correct brief filed on Jan. 12, 1939, filed by taxpayer. 1/28/39 granted.

Feb. 10—Brief filed by General Counsel.

Feb. 27—Reply brief filed by taxpayer. 3/11/39 copy served.

Mar. 21—Stipulation to correct the transcript filed.

May 19—Memorandum opinion rendered, John E. Murdock, Div. 3. Decision will be entered in accordance with the notice of deficiency.

May 22—Decision entered, J. E. Murdock, Div. 3.

May 27—Motion to vacate decision and modify opinion so as to provide for recomputation under Rule 50 filed by General Counsel. 6/1/39 granted.

Jun. 13—Computation of deficiency filed by General Counsel.

Jun. 15—Hearing set July 5, 1939, on settlement.

Jun. 23—Consent to settlement filed by taxpayer.

Jun. 30—Decision entered, J. E. Murdock, Div. 3.

Sept. 22—Petition for review by U. S. Circuit Court of Appeals (2) with assignments of error filed by General Counsel.

Sept. 30—Proof of service filed by General Counsel. 4—3 Attorneys and 1 for taxpayer.

Oct. 10—Praecipe for record filed by General Counsel.

Oct. 20—Proofs of service of filing praecipe filed by General Counsel.

Oct. 21—Agreed amended praecipe for record filed by General Counsel. Proof of service thereon.

4 Before United States Board of Tax Appeals

Docket No. 77827

[Same title.]

Petition

Filed November 12, 1934

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated August 15, 1934 (IT:AR:A-2 MEW-90D), and as a basis of his proceeding alleges as follows:

1. At all the times herinafter mentioned petitioner was and still is a resident of the City of Buffalo, County of Erie and State of New York.

2. The notice of deficiency, a copy of which is attached hereto marked "Exhibit A," was mailed to the petitioner on August 15, 1934.

3. The tax in controversy is an income tax for the calendar year 1930, and amounts to the sum of $35,645.83.

4. The determination of tax set forth in said deficiency letter is based upon the error that if the United States Board of Tax Appeals decides in favor of respondent petitioner's appeal now pending before it (Docket No. 65203), involving petitioner's income tax liability for the year 1929, respondent has erroneously included in petitioner's net income for the year 1930 an amount of $60,475.75, upon the ground that said amount
5 represented a profit realized by petitioner on the dissolution in the year 1930 of Marine Equities Corporation.

5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

(a) On or about the 18th and 19th days of September 1929, petitioner purchased on a "when, as and if" basis, 2,000 shares of the capital stock of Marine Midland Corporation. Thereafter and on or about the 18th day of October 1929, there were issued to petitioner on account of said purchase, stock certificates representing said shares, for which on said date petitioner paid $166,025.00.

(b) On or about the 16th day of October 1929, petitioner purchased 10,000 additional shares of the common capital stock

of said Marine Midland Corporation at $60.00 per share, or a total price of $600,000.00.

(c) On November 18, 1929, petitioner duly subscribed for 11,550 shares of the capital stock of Marine Equities Corporation, a New York corporation with its principal office and place of business in the City of Buffalo, New York, and paid therefor $35.275 per share, or a total subscription price of $407,426.25.

(d) On November 19, 1929, petitioner duly sold to said Marine Equities Corporation 1,550 shares of the Marine Midland Corporation stock which he had theretofore purchased on the 18th and 19th days of September 1929, and the 10,000 shares of said stock which he had purchased on the 16th day of October 1929, for which petitioner received from said Marine Equities Corporation $407,137.50.

6 (e) On or about the 17th day of May 1930, said Marine Equities Corporation was duly dissolved, and on or about the same date petitioner received on the liquidation of said corporation, in consideration of the surrender of his stock therein, 11,490 shares of the capital stock of Marine Midland Corporation and $2,557.00 in cash. On the date said Marine Midland Corporation stock was received by petitioner it had a fair market value of $40.50 per share, or an aggregate value of $465,345.00, or an aggregate amount received on said liquidation of stock and cash of $467,902.00.

(f) The respondent, in his deficiency letter (a copy of which is attached hereto and designated Exhibit A), has included in petitioner's net income an amount of $60,475.75 upon the ground that the petitioner derived a profit of that amount on the liquidation of said Marine Equities Corporation.

6. Wherefore, petitioner prays that this Board may hear the proceeding and determine that if the Board decides petitioner's appeal now pending before it (Docket No. 65203), involving petitioner's income tax liability for the year 1929, in favor of the respondent, respondent has erroneously determined that petitioner derived a profit of $60,475.75 on the liquidation of Marine Equities Corporation.

(S) RALPH M. ANDREWS,
Counsel for Petitioner,
Office and Post Office Address, 1330 Marine Trust Building,
239 Main Street, Buffalo, New York.

7 [*Duly sworn to by Seymour H. Knox; jurat omitted in printing.*]

8 *Exhibit A annexed to petition*

SN-A.

TREASURY DEPARTMENT,
Washington, Aug. 15, 1934.

Office of Commissioner of Internal Revenue. Address Reply to Commissioner of Internal Revenue and Refer to—

Mr. SEYMOUR H. KNOX,
2100 Rand Building, Buffalo, New York.

SIR: You are advised that the determination of your income tax liability for the year(s) 1930, discloses a deficiency of $35,645.83 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1928, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Com-
9 missioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully.

GUY T. HELVERING,
Commissioner.

By (Signed) CHAS. T. RUSSELL,
Deputy Commissioner.

Enclosures:
Statement.
Form 870.

STATEMENT

IT:AR:A-2.
MEW-90D.

In re: Mr. Seymour H. Knox, 2100 Rand Building, Buffalo, New York

Income Tax Liability year 1930; income tax liability $40,656.51; income tax assessed $5,010.68; deficiency $35,645.83.

10 The deficiency shown herein is based upon the report dated December 14, 1932, prepared by Revenue Agent H. E. Murray, and transmitted to you under date of December 30, 1932, and upon such adjustments as are shown below.

Subsequent to the issuance of office letter dated April 11, 1934, in which you were advised of the adjustments proposed and the proposed disallowance of your claim for refund, a protest was received and a conference was held in this office on June 26, 1934. At the conference you were represented by Mr. Ralph M. Andrews and Mr. Charles A. Harmon, Buffalo, New York.

The issues involved were:

First. Profit on sale of Marine Union Investors' stock.

Second. Profit on liquidation of Marine Equities, Incorporated, in 1930.

In regard to issue one, the revenue agent disallowed the loss of $309,248.06, claimed and computed a profit of $68,407.94 upon the sale of 21,940 shares of Marine Union Investors stock. In arriving at the profit, the examining officer based his action upon the actual identification of stock certificates representing stock exchanged and used an average cost of $22.00 per share for the stock sold.

Discussion of this issue in conference develops that, included in the 21,940 shares sold, were 8,575 shares of Marine Share Corporation, which were assigned to you on September 1, 1928. It is held that per share value to be allotted to the stock is $55.25, or the fair market value on the date assigned.

This is in accordance with the decision of the United States Board of Tax Appeals in the case of Ralph W. Harbi-
11 son, reported in 26, Board of Tax Appeals, page 896, wherein it was held that the basis for determining gain or loss on the sale of personal property acquired by will, upon the termination of a trust, is the fair market value of the property at the time of distribution; the time of distribution being held in your case to be September 1, 1928, when you became thirty years of age, and when, by the terms of your father's will, you were to receive one-half of the balance of a trust fund set up for your benefit under the will.

Relative to issue two, you are advised that information on file in this office discloses that in 1929 you claimed a loss on the sale of 11,550 shares of Marine Midland Corporation stock, which was disallowed for the reason that control of the stock remained with you through the immediate purchase of 11,550 shares of Marine Equities, Incorporated; the Marine Equities having been organized by you and other stockholders in 1929. The examining officer based his action of the disallowance of the loss on the

grounds that no loss or gain resulted from the transaction under the provisions of section 112 (b) (5) of the Revenue Act of 1928.

In 1930, the Midland Equities, Incorporated, liquidated and you received 11,490 shares of Marine Midland stock at a market value of $465,345.00 and cash of $2,557.00, or a value of $467,902.00; the cost of these shares being $409,426.25, resulted in a profit of $60,475.75 upon the liquidation.

It is noted that the United States Board of Tax Appeals ruled in the case of James E. Wells, 29 Board of Tax Appeals #43, a stockholder in the Marine Midland Corporation, that the taxpayer sustained a deductible loss in 1929 upon the transaction; however, in view of the fact that the Commissioner of Internal Revenue has rendered a nonacquiescence in this decision as
12 reported in Internal Revenue Bulletin, volume XIII, #3, published January 15, 1934, the previous action of the Bureau in including the gain of $60,475.75 as taxable income for 1930 is sustained.

A synopsis of your adjusted income tax liability follows:

Income shown on the return exclusive of capital net gain		$64,529.25
Add:		
1. Interest increased		303.00
2. Loss on sales decreased		178,536.03
3. Dividends increased		2,379.50
4. Salary disallowed		600.00
5. Interest disallowed		582.34
		$246,930.12
Less:		
6. Fiduciary income	$941.96	
7. Contributions increased	2,872.99	
		3,814.95
Income subject to surtax		$243,115.17
Less:		
Dividends	$628,513.05	
Liberty bond interest	383.69	
Personal exemption and credit for dependents	4,300.00	
		633,196.74
Income for normal tax		None
Surtax on $243,115.17		$40,283.03
Tax at 12½ percent on capital net gain of $4,287.41		535.92
Total tax		$40,818.95
13 Less:		
Earned income credit limited to 25 percent of surtax on $26,650.04	$156.38	
Tax paid at source	6.06	162.44
Total tax assessable		$40,656.51
Tax previously assessed		5,010.68
Additional tax to be assessed		$35,645.83

Explanation of Changes

1. Interest on tax-free covenant bonds received from the estate of Seymour H. Knox in the amount of $303.00 has been transferred from fiduciary income to the proper block on the return.

2. Loss on sale of stocks is decreased by $178,536.03 as follows:

Loss on sale of 21,940 shares of Marine Union stock disallowed		$88,293.98
Loss on disposition of 16,600 shares of Marine Union stock disallowed		97,295.70
		$185,589.68
Less:		
Loss on various stocks through "Blue-Jay" accounts resulted in a loss of	$4,023.25	
whereas there was reported a profit of	3,030.40	7,053.65
Net increase in income		$178,536.03

14 The loss sustained upon the disposition of 21,940 shares of Marine Union Investors stock is computed as follows:

Marine Share Corporation

2/28/29—940 shares @ $32.00		$30,080.00
2/28/30—3,000 shares @ $32.00		70,575.00
3,940 shares		$100,655.00
8/4/27—43 rights purchased	$344.00	
9/1/27—340 shares acquired through above rights	6,800.00	
340 shares value	$7,144.00	
9/1/28—8,575 shares assigned to taxpayer at a value of $55.25 per share	$473,768.75	
8/30/28—85 shares purchased	2,550.00	
9,000 shares value	$483,462.75	
9,000 shares exchanged 2 for 1 in Marine Union Investors, Incorporated, or—		
18,000 shares value		$483,462.75
3,940 shares cost		100,655.00
21,940 shares total		$584,117.75
Brought forward		584,117.75
21,940 shares sold		367,406.94
Loss		216,710.81
15 340 shares value $7,144.00 now 680 shares value $7,144.00 held more than 2 years sold for 680/21,940 of $367,406.94 or selling price	$11,387.00	
Cost	7,144.00	
Capital net gain	$4,243.27	
Total loss shown above		$216,710.81
Increased by capital net gain transferred to Schedule D		4,243.27
Total ordinary loss		$220,954.08

Loss shown on return	309,248.06
Loss disallowed	$88,293.98
Loss claimed on the disposition of 16,600 shares of this stock is disallowed by this same adjustment	$97,295.70

3. Dividends were increased as follows:

Unreported dividends received through the Blue-Jay account	$257.50
Unreported dividend from the Statler Hotels	160.00
Unreported dividend from Marine Midland	3,552.00
	$3,969.50

16 Less:

Extra dividend paid December 31, 1929 on United States Steel stock	$1,142.00	
Decrease in dividends through Seymour H. Knox Trust	448.00	1,590.00
Net increase		$2,379.50

4. The amou't of $600.00 paid as salary to accountant is disallowed since it also claimed and allowed on line 18 as other deductions.

5. Interest payments were overstated by $582.34.

6. Fiduciary income is decreased by $941.96 as follows:

Amount transferred to tax-free covenant bond block of the return (item 2 above)	$303.00
Overstatement of distributable income from Seymour H. Knox Trust	638.96
Total	$941.96

7. Due to the increase in income the entire amount of $14,203.00 claimed for contributions can now be allowed as a deduction, or an increase of $2,872.99.

Reference is made to your claim for refund in the amount of $5,010.68 income taxes for the taxable year 1930.

The claim is based upon the statement that if the sale of Marine Midland Corporation stock for Midland Equities is
17 treated as a nontaxable reorganization in 1929, the loss upon the liquidation of Midland Equities, Incorporated, in 1930 was understated.

The exchange feature in the year 1929 is still pending in this office and the Commissioner of Internal Revenue has rendered a nonacquiescence (Internal Revenue Bulletin, Volume XIII, #3), in the similar case of James E. Wells, 29 B. T. A. #43.

For the foregoing reason your claim will be disallowed. Official notice of the disallowance of your claim will be issued by registered mail in accordance with section 1103 (a) of the Revenue Act of 1932.

Copies of this letter have been mailed to your representatives, Mr. Ralph M. Andrews, 1330 Marine Trust Building, Buffalo, New York, and Mr. Charles A. Harmon, 422 M. and T. Building, Buffalo, New York, in accordance with the authority conferred upon them in the powers of attorney executed by you and on file with the Bureau.

18 Before United States Board of Tax Appeals

Docket Number 77827

[Same title.]

Answer

Filed Jan. 9, 1935

The Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Admits the allegations contained in Paragraph 1.
2. Admits the allegations contained in Paragraph 2.
3. Admits the allegations contained in Paragraph 3.
4. Denies each and every allegation of error set forth in Paragraph 4 of the petition.
5. Denies the allegations set forth in Paragraphs 5 (a), 5 (b), 5 (c), 5 (d), 5 (e), and 5 (f) of the petition.
6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

19 Wherefore it is prayed that the taxpayer's appeal be denied.

(Signed) ROBERT H. JACKSON,
Robert H. Jackson,
Assistant General Counsel for the Bureau of Internal Revenue.

Of Counsel:
S. L. YOUNG,
Special Attorney,
Bureau of Internal Revenue.

sly-k 1-8-34.

20 Before United States Board of Tax Appeals

(Stamp—United States Board of Tax Appeals—Lodged—July 20, 1937.)

Docket No. 77827

[Same title.]

Amended answer

Filed July 24, 1937

Comes now the Commissioner of Internal Revenue, by his attorney, Morrison Shafroth, Chief Counsel, Bureau of Internal Revenue, and for amended answer to the petition filed in the above-entitled proceeding, admits, denies, avers, and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits that the tax in controversy is income tax for the calendar year 1930, but denies that the amount in controversy is as alleged in paragraph 3 of the petition.

4, 5, and 6. Avers that since the Board, by opinion promulgated January 24, 1936, and decision entered March 10, 1936, has decided petitioner's appeal (Docket No. 65203) for the year 1929 against the respondent and in favor of the petitioner,

21 the averments and allegations contained in paragraphs 4, 5, and 6 are now wholly immaterial and insufficient to show that the Commissioner erred in any way in determining the deficiency asserted in the notice of deficiency. For further answer to said averments and allegations, the respondent denies the same.

7. Avers that in determining the deficiency set out in the notice of deficiency, the Commissioner erred in favor of the petitioner by allowing as a deduction $186,575.08 as an ordinary loss on the sale of 17,150 shares of capital stock of Marine Union Investors, Inc., instead of finding that petitioner had realized a capital gain of $79,293.58 on the sale of 10,320 of such shares and including the same in income, and finding that petitioner had realized an ordinary loss of $13,687.41 on the sale of 6,830 of such shares and limiting the deduction to such amount.

8. The respondent relies on the following facts in support of the above averment:

(a) In the years 1927 and 1928 petitioner was the sole beneficiary of a trust created under and pursuant to the will of his father.

(b) On August 31, 1927, the trustees of said trust purchased for cash 5,160 shares of capital stock of Marine Share Corporation at $20.00 per share or for a total purchase price of $103,200.00. Thereafter, on July 20, 1928, said corporation issued to its stockholders rights to acquire additional shares of its capital stock, which rights were exercised by the trustees of the aforesaid trust on August 30, 1937. At the times of the issuance and exercise of such rights the market value of the shares of capital stock of Marine Share Corporation (ex-rights) was $50.75 per share
22 or 90.625% of the total value of the share and the right.

At the same times the market value of the rights was $5.25 per right, or 9.375% of the total value of the shares and the rights. Of the original cost of the 5,160 shares of Marine Share Corporation stock, 9.375 or $9,675.00 is allocable to such rights, leaving an adjusted cost to the trust for the 5,160 shares of $93,525.00.

(c) On or about September 1, 1928, said 5,160 shares of Marine Share Corporation stock was transferred from such trust to petitioner. The basis to petitioner of said 5,160 shares of Marine Share Corporation stock was the same as the adjusted cost thereof to the trustees of the aforesaid trust, viz, $93,575.00. Thereafter, said 5,160 shares of capital stock of Marine Shares Corporation were in a nontaxable reorganization exchanged by the petitioner for 10,320 shares of Marine Union Investors, Inc. The basis to the petitioner of the 10,320 shares of stock of the Marine Union Investors, Inc., was the same as the basis to petitioner of the 5,160 shares of capital stock of Marine Share Corporation, viz, $93,525.00. On June 10, 1930, petitioner sold said 10,320 shares of Marine Union Investors, Inc., for a total selling price of $172,818.58. Petitioner realized a profit on the sale of said shares of $79,293.58, which profit is taxable as a capital gain.

(d) On August 30, 1928, the trustees of the aforesaid trust, through the exercise of rights, including the rights received on the 5,160 shares mentioned above, obtained 3,415 shares of capital stock of Marine Share Corporation at a cash expenditure of $102,450.00. The portion of the cost to the trust of the shares on which such rights were received allocable to such rights was 3,415 multiplied by $20.00 multiplied by .09375, or $25,612.50.

The adjusted cost to the trust of said 3,415 shares of capital
23 stock of Marine Share Corporation was $128,062.50, viz, $102,450.00 plus $25,612.50.

(e) On or about September 1, 1928, said 3,415 shares of capital stock of Marine Share Corporation were transferred by the trustees of the aforesaid trust to the petitioner. The basis to petitioner of said 3,415 shares of stock was the same as the adjusted cost thereof to the trustees of the aforesaid trust, viz, $128,-

062.50. Thereafter the petitioner in a nontaxable reorganization exchanged 3,415 shares of capital stock of Marine Share Corporation for 6,830 shares of capital stock of Marine Union Investors, Inc. The basis to petitioner of said 6,830 shares of capital stock of Marine Union Investors, Inc. was the same as the basis to petitioner of the 3,415 shares of capital stock of Marine Share Corporation, viz, $128,062.50. On June 10, 1930, petitioner sold the 6,830 shares of capital stock of Marine Union Investors Corporation for $114,375.09. The petitioner sustained an ordinary loss on the sale of said shares of $13,687.41.

(f) In determining the deficiency the Commissioner treated $473,768.75 as the selling price of the two blocks aggregating 17,150 shares of capital stock of the Marine Union Investors, Inc., used $287,193.67 as the basis to petitioner of said 17,150 shares of stock, and allowed as a deduction $186,575.08 as an ordinary loss sustained on the sale of said stock.

Wherefore, it is prayed that the Board redetermine the correct amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, viz, $35,645.83 plus any and all additional amounts which may result
24 from the correction of any error made by the Commissioner. The Commissioner hereby makes claim for the increased deficiency resulting from such redetermination.

(Signed) MORRISON SHAFROTH,
Morrison Shafroth,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
F. R. SHEARER,
E. L. UPDIKE,
Special Attorneys,
Bureau of Internal Revenue.

elu/bs 7/15/37.

25 Before United States Board of Tax Appeals

Docket No. 77827

[Same title.]

Reply

The petitioner by his attorney, John L. Kenefick, in reply to respondent's amended answer herein, admits and denies the affirmative allegations of said amended answer as follows:

4, 5, and 6. Admits that by opinion promulgated January 24, 1936, and decision entered March 10, 1936, the Board has decided

petitioner's appeal (Docket No. 65203) for the year 1929 against the respondent and in favor of the petitioner. Denies each and every other allegation contained in paragraphs 4, 5, and 6 of respondent's amended answer.

7. Admits that the Commissioner of Internal Revenue has allowed petitioner a deduction of $186,575.08 as an ordinary loss on the sale of 17,150 shares of the capital stock of Marine Union Investors, Inc., and that he did not determine that petitioner had realized a capital gain of $79,293.58 on the sale of 10,320 of such shares and an ordinary loss of $13,687.41 on the sale of 6,830 of such shares. Denies that the Commissioner of Internal Revenue erred in so determining. Denies each and every other allegation contained in paragraph 7 of respondent's amended answer.

8 (a). Admits the allegations contained in paragraph 8 (a) of respondent's amended answer.

8 (b) Denies each and every allegation contained in paragraph 8 (b) of respondent's amended answer, and alleges the facts
26 in this regard to be that on September 1, 1927, the Trustees of said trust for the petitioner purchased 13,660 shares of the capital stock of Marine Share Corporation, paying therefor in cash at $20 per share, an aggregate purchase price of $273,200. Thereafter and on July 20, 1928, said Marine Share Corporation issued rights to the holders of its common stock of record July 20, 1928, entitling said stockholders to acquire on or before September 30, 1928, at $30 per share, one new share of the common stock of said corporation for each four shares held. That on or about said July 20, 1928, said Trustees received in respect of their holdings of 13,660 shares of Marine Share Corporation stock rights entitling them to acquire 3,415 additional shares of said common stock. On said July 20, 1928, the date said rights were issued, the stock of Marine Share Corporation (ex rights) had a fair market value of $50.75 per share, or 90.625% of the total value of the shares and rights, and the rights had a fair market value of $5.25 per right, or 9.375% of the total value of the shares and rights. The portion of the cost to the Trustees of the shares as to which the rights entitling the Trustees to acquire 3,415 additional shares were issued, was 9.375% of $273,200, or $25,612.50. The portion of the cost to the Trustees allocable to the shares as to which said rights were issued was $247,587.50.

8 (c). Denies that on or about September 1, 1928, said 5,160 shares of Marine Share Corporation stock were transferred from said trust to the petitioner, and alleges the facts in this regard to be that, in accordance with the terms of the will creating said

trust for petitioner, the latter became entitled to receive on September 1, 1928, and thereafter and on October 8, 1928, did receive from the trustees of said trust 5,160 shares of the trustees' original acquisition of 13,660 shares of the capital stock of Marine Share Corporation, said stock on that date having a fair
27 market value of $55.25 per share, or an aggregate fair market value of $285,090.00. Admits that thereafter said 5,160 shares of the capital stock of Marine Share Corporation were in a non-taxable transaction exchanged by the petitioner for 10,320 shares of the capital stock of Marine Union Investors, Inc. Admits that on June 10, 1930, petitioner sold said 10,320 shares of the capital stock of Marine Union Investors, Inc., for $172,818.58. Denies each and every other allegation contained in paragraph 8 (c) of respondent's amended answer.

8 (d). Admits that on August 30, 1928, the Trustees of said trust for petitioner exercised all of the rights received in respect of their original acquisition of 13,660 shares of the capital stock of Marine Share Corporation and acquired 3,415 additional shares of the common stock of said corporation, paying therefor $102,450 in cash. Admits that the portion of the cost to the Trustees of the shares on which such rights were received allocable to such rights was $25,612.50. Admits that the adjusted cost to the Trustees of said 3,415 shares of the capital stock of Marine Share Corporation was $102,450, plus $25,612.50, or $128,062.50, but denies that the same is in any respect material in this proceeding. Denies each and every other allegation contained in paragraph 8 (d) of respondent's amended answer.

8 (e). Denies that on or about September 1, 1928, said 3,415 shares of the capital stock of Marine Share Corporation were transferred by the Trustees of the aforesaid trust to petitioner, and alleges the facts in this regard to be that in accordance with the terms of the will creating said trust petitioner became entitled on September 1, 1928, to receive and thereafter and on October 8, 1928, did receive from the Trustees of the trust said 3,415 shares of the capital stock of Marine Share Corporation. Admits that
28 thereafter the petitioner in a nontaxable reorganization exchanged said 3,415 shares of the capital stock of Marine Share Corporation for 6,830 shares of the capital stock of Marine Union Investors, Inc. Admits that on June 10, 1930, petitioner sold said 6,830 shares of the capital stock of Marine Union Investors, Inc., for $114,375.09. Denies each and every other allegation contained in paragraph 8 (e) of respondent's amended answer.

8 (f). Upon information and belief, denies that in determining the deficiency against petitioner the Commissioner treated $473,-

768.75 as the selling price of the two blocks aggregating 17,150 shares of the capital stock of Marine Union Investors, Inc., and alleges that the Commissioner correctly used $287,193.67 as said selling price. Upon information and belief, denies that the Commissioner used $287,193.67 as the basis to petitioner of said 17,150 shares of stock, and alleges that the Commissioner correctly used $473,768.75 as said basis. Admits that the Commissioner allowed a deduction of $186,575.08 as an ordinary loss sustained on the sale of said stock. Denies each and every other allegation contained in paragraph 8 (f) of respondent's amended answer.

Wherefore, the petitioner prays that the Board may hear the proceeding and determine that there is no greater deficiency in petitioner's income tax liability than that determined by the respondent in his final determination.

JOHN L. KENEFICK,
Counsel for Petitioner,
Office and Post Office Address, 1330 Marine Trust Building,
239 Main Street, Buffalo, New York.

29 [*Duly sworn to by Seymour H. Knox; jurat omited in printing.*]

30 Before United States Board of Tax Appeals

Docket No. 77827

[Same title.]

Amendment to amended answer

Filed at Hearing December 14, 1938

Comes now the Commission of Internal Revenue by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for amendment to the amended answer heretofore filed in the above-entitled proceeding avers and alleges as follows:

9. Avers that in determining the deficiency set out in the notice of deficiency the Commissioner erred in favor of the petitioner by failing to include in petitioner's 1930 income a taxable dividend of $35,982.00 received by the petitioner from Marine Midland Corporation.

10. The respondent relies on the following facts in support of the above averment:

(a) On November 6, 1929, Marine Midland Corporation declared a dividend on its common stock equal to thirty cents per share, payable December 31, 1929, to stockholders of record as of the close of business on December 2, 1929.

(b) Petitioner thereafter as the record holder of 119,940 of said shares of said stock at the close of business on December 2, 1929, received in respect thereof $35,982.00 of said dividend.

31 (c) In determining the deficiency set out in the notice of deficiency no part of said deficiency was included in income by the Commissioner.

(d) The amount used by the Commissioner in his notice of deficiency as petitioner's income from dividends of domestic corporations should be increased by said amount of $35,982.00.

Wherefore it is prayed that the Board redetermine the correct amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, viz., $35,645.83, plus any and all additional amounts which may result from the correction of any error made by the Commissioner. The Commissioner hereby makes claim for the increased deficiency resulting from such redetermination.

(Signed) J. P. WENCHEL,
K.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
W. HERMAN SCHWATKA,
EDWARD L. UPDIKE,
Special Attorneys,
Bureau of Internal Revenue.
ELU-afh 12-12-38.

32 Before United States Board of Tax Appeals

Docket No. 77827

[Same title.]

Amended reply

Filed at Hearing Dec. 14, 1938

The petitioner by his attorney, Ralph M. Andrews, in reply to respondent's amended answer and respondent's amendment to his amended answer herein, admits and denies the affirmative allegations of said amended answer and said amendment to said amended answer, as follows:

4, 5, and 6. Admits that by opinion promulgated January 24, 1936, and decision entered March 10, 1936, the Board has decided petitioner's appeal (Docket No. 65203) for the year 1929 against the respondent and in favor of the petitioner. Denies each and every other allegation contained in paragraphs 4, 5, and 6 of respondent's amended answer.

7. Admits that the Commissioner of Internal Revenue has allowed petitioner a deduction of $186,575.08 as an ordinary loss on the sale of 17,150 shares of the capital stock of Marine Union Investors, Inc., and that he did not determine that petitioner had realized a capital gain of $79,293.58 on the sale of 10,320 of such shares and an ordinary loss of $13,687.41 on the sale of 6,830 of such shares. Denies that the Commissioner of Internal Revenue erred in so determining. Denies each and every other allegation contained in paragraph 7 of respondent's amended answer.

33 8 (a) Admits that in the years 1927 and 1928 petitioner was the sole beneficiary then entitled to receive income and, upon his thirtieth birthday on September 1, 1928, a part of the principal of a trust created under and pursuant to the will of his father.

8 (b) Denies each and every allegation contained in paragraph 8 (b) of respondent's amended answer, and alleges the facts in this regard to be that on September 1, 1927, the Trustees of said trust for the petitioner purchased 13,660 shares of the capital stock of Marine Share Corporation, paying therefor in cash at $20 per share, an aggregate purchase price of $273,200. Thereafter and on July 20, 1928, said Marine Share Corporation issued rights to the holders of its common stock of record July 20, 1928, entitling said stockholders to acquire on or before September 30, 1928, at $30 per share, one new share of the common stock of said corporation for each four shares held. That on or about said July 20, 1928, said Trustees received in respect of their holdings of 13,660 shares of Marine Share Corporation stock rights entitling them to acquire 3,415 additional shares of said common stock. On said July 20, 1928, the date said rights were issued, the stock of Marine Share Corporation (ex rights) had a fair market value of $50.75 per share, or 90.625% of the total value of the shares and rights, and the rights had a fair market value of $5.25 per right, or 9.375% of the total value of the shares and rights. The portion of the cost to the Trustees of the shares as to which the rights entitling the Trustees to acquire 3,415 additional shares were issued, was 9.375% of $273,200, or $25,612.50. The portion of the cost to the Trustees allocable to the shares as to which said rights were issued was $247,587.50.

34 8 (c) Admits that on or about September 1, 1928, said 5,160 shares of Marine Share Corporation stock were transferred from said trust to the petitioner, and alleges the facts in this regard to be that, in accordance with the terms of the will creating said trust for petitioner, the latter became entitled to receive on September 1, 1928, and on that date, did

receive from the Trustees of said trust 5,160 shares of the Trustees' original acquisition of 13,660 shares of the capital stock of Marine Share Corporation, said stock on that date having a fair market value of $55.25 per share, or an aggregate fair market value of $285,090.00. Admits that thereafter said 5,160 shares of the capital stock of Marine Share Corporation were in a nontaxable transaction exchanged by the petitioner for 10,320 shares of the capital stock of Marine Union Investors, Inc. Admits that on June 10, 1930, petitioner sold said 10,320 shares of the capital stock of Marine Union Investors, Inc., for $172,818.58. Denies each and every other allegation contained in paragraph 8 (c) of respondent's amended answer.

8 (d) Admits that on August 30, 1928, the Trustees of said trust for petitioner exercised all of the rights received in respect of their original acquisition of 13,660 shares of the capital stock of Marine Share Corporation and acquired 3,415 additional shares of the common stock of said corporation, paying therefor $102,450 in cash. Admits that the portion of the cost to the Trustees of the shares on which such rights were received allocable to such rights was $25,612.50. Admits that the adjusted cost to the Trustees of said 3,415 shares of the capital stock of Marine Share Corporation was $102,450, plus $25,612.50, or $128,062.50, but denies that the same is in any respect material in this proceeding. Denies each and every other allegation contained in paragraph 8 (d) of respondent's amended answer.

35 8 (e). Admits that on or about September 1, 1928, said 3,415 shares of the capital stock of Marine Share Corporation were transferred by the Trustee of the aforesaid trust to petitioner, and alleges the facts in this regard to be that in accordance with the terms of the will creating said trust petitioner became entitled on September 1, 1928, to receive and on that date did receive from the Trustees of the trust said 3,415 shares of the capital stock of Marine Share Corporation. Admits that thereafter the petitioner in a non-taxable reorganization exchanged said 3,415 shares of the capital stock of Marine Share Corporation for 6,830 shares of the capital stock of Marine Union Investors, Inc. Admits that on June 10, 1930, petitioner sold said 6,830 shares of the capital stock of Marine Union Investors, Inc., for $114,375.09. Denies each and every other allegation contained in paragraph 8 (e) of respondent's amended answer.

8 (f). Upon information and belief, denies that in determining the deficiency against petitioner the Commissioner treated $473,-968.75 as the selling price of the two blocks aggregating 17,150 shares of the capital stock of Marine Union Investors, Inc., and

alleges that the Commissioner correctly used $287,193.67 as said selling price. Upon information and belief, denies that the Commissioner used $287,193.67 as the basis to petitioner of said 17,150 shares of stock, and alleges that the Commissioner correctly used $473,768.75 as said basis. Admits that the Commissioner allowed a deduction of $186,575.08 as an ordinary loss sustained on the sale of said stock. Denies each and every other allegation contained in paragraph 8 (f) of respondent's amended answer.

36 9. Admits that in determining the deficiency set out in the notice of deficiency the Commissioner failed to include in petitioner's 1930 income a taxable dividend of $35,982.00 received by the petitioner from Marine Midland Corporation.

10 (a). Admits the allegations contained in paragraph 10 (a) of respondent's amendment to his amended answer.

10 (b). Admits the allegations contained in paragraph 10 (b) of respondent's amendment to his amended answer.

10 (c). Admits that in determining the deficiency set out in the notice of deficiency no part of said dividend was included in income by the Commissioner.

10 (d). Admits the allegations contained in paragraph 10 (d) of respondent's amendment to his amended answer.

Denies generally and specifically each and every affirmative allegation contained in respondent's amended answer and his amendment to said amended answer not hereinbefore specifically admitted, qualified, or denied.

Wherefore, the petitioner prays that the Board may hear the proceeding and determine that there is no greater deficiency in petitioner's income tax liability than that determined by the respondent in his final determination, increased solely and only by an increase in petitioner's income from dividends of domestic corporations in the amount of $35,982.00.

RALPH M. ANDREWS,
Counsel for Petitioner,
Office and Post Office Address, 1330 Marine Trust Building,
239 Main Street, Buffalo, New York.

37 Before United States Board of Tax Appeals

Docket No. 77827

[Same title.]

Stipulation of facts

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts

shall be taken as true for the purpose of these proceedings and in the determination of the above appeal, provided, however, that this stipulation shall be without prejudice to the right of either party hereto to introduce other and further evidence at the hearing hereof not inconsistent with the facts herein stipulated to be true.

1. Seymour H. Knox, the petitioner herein, is and at all times material herein was a resident of the City of Buffalo, New York.

I

2. Petitioner derived an ordinary gain of $60,475.75 on the dissolution and liquidation of Marine Equities Corporation on May 17, 1930. Petitioner properly reported said gain in his income tax return for the calendar year 1930 and the Commissioner of Internal Revenue has properly retained said gain in petitioner's gross income in his final determination (Exhibit A of the petition herein).

II

3. Petitioner's father, Seymour H. Knox, died on May 16, 1915 leaving a Last Will and Testament, a true and cor-
38 rect copy of which is annexed hereto, designated Exhibit A and hereby made part hereof.

4. On August 31, 1927, the trustees of the trust, created under Subdivision (C) of Article Twenty-first of petitioner's father's will (Exhibit A), purchased 13,660 shares of the capital stock of Marine Share Corporation, a New York corporation, paying therefor in cash at $20.00 per share an aggregate of $273,200.00. Thereafter, on July 20, 1928, said Marine Share Corporation issued to the holders of its common stock of record on July 20, 1928 rights entitling said stockholders to obtain on or before August 31, 1928 at $30.00 per share, one new share of the common stock of said corporation for each four shares held. Accordingly, immediately after July 20, 1928, said trustees received in respect of their holdings of 13,660 shares of the capital stock of Marine Share Corporation a subscription warrant entitling them to obtain 3,415 additional shares of said common stock. On July 20, 1928, the date on which said rights were issued, Marine Share Corporation stock (ex-rights) had a fair market value of $50.75 per share or 90.625 per cent of the total value of the shares and rights, and the rights had a fair market value of $5.25 per right (four rights being necessary to acquire one new share) or 9.375 per cent of the total value of the shares and rights.

5. On August 30, 1928 the trustees of said trust for petitioner exercised all of the rights received in respect of said 13,660 shares of the capital stock of Marine Share Corporation and obtained 3,415 additional shares of the common stock of said corporation paying therefor $102,450.00 in cash. On August 30, 1928, the date on which said rights were exercised, Marine Share Corporation stock (ex-rights) had a fair market value of $53.50 per share or 90.105 per cent of the total value of the shares and rights, and the rights had a fair market value of $5.875 per right or 9.895 per cent of the total value of the shares and rights.

6. Petitioner attained the age of thirty years on September 1, 1928. Thereupon on that date said trustees, pursuant to "Article twenty-first (C)" of the will of petitioner's father, transferred of record and delivered to petitioner certain securities and property including certificates representing 5,160 shares of the trustees' original purchase of 13,660 shares of the capital stock of Marine Share Corporation and all of the 3,415 shares of the capital stock of said corporation obtained on August 30, 1928, by the trustees on the exercise of rights.

7. On September 1, 1928, shares of the capital stock of Marine Share Corporation had a fair market value of $55.25 per share.

8. Thereafter and on or about March 1, 1929, petitioner exchanged said 8,575 shares of the capital stock of Marine Share Corporation received by petitioner as stated in paragraph 6 hereof for 17,150 shares of the capital stock of Marine Union Investors, Inc. Said exchange was nontaxable under Section 112 (b) (3) of the Revenue Act of 1928.

9. Thereafter on June 10, 1930, petitioner sold said 17,150 shares of the capital stock of Marine Union Investors, Inc., for $287,193.67.

10. In his notice of deficiency (Exhibit A of the petition in this proceeding) the Commissioner held (a) that the basis to the petitioner for tax purposes of said 17,150 shares of Marine Union Investors, Inc., was $473,768.75, to wit, the fair market value on September 1, 1928, of the 8,575 shares of the capital stock of Marine Share Corporation; (b) that the selling price of said 17,150 shares of Marine Union Investors, Inc., stock was $287,193.67, and (c) allowed $186,575.08 as a deduction as an ordinary loss sustained on the sale of said stock.

11. The executors of the last will and testament of petitioner's father, Seymour H. Knox, deceased, and the trustees of the trust created under "Article Twenty-first (C)" of petitioner's father's will, complied with the provisions of said will and the require-

ments of the laws of the State of New York with respect to distributions of income including accumulated income.

12. Said executors, said trustees, and the petitioner at all times kept their respective books of account and filed their respective tax returns on a cash receipts and disbursements basis.

III

13. On November 6, 1929, Marine Midland Corporation declared a dividend on its common stock equal to 30 cents per share, payable December 31, 1929, to stockholders of record as of the close of business on December 2, 1929. Petitioner thereafter, as the record holder of 119,940 of said shares of said stock at the close of business on December 2, 1929, received in respect thereof $35,982.00 of said dividend. It is stipulated and agreed by the parties hereto that petitioner's income from dividends of
41 domestic corporations during the calendar year 1930 should be increased by said amount of $35,982.00.

RALPH M. ANDREWS,
Counsel for Petitioner.

Signed J. P. WENCHEL,
Y.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

42 *Exhibit A annexed to stipulation of facts*

LAST WILL AND TESTAMENT OF SEYMOUR H. KNOX

DATED MAY 12TH, 1915

LAST WILL AND TESTAMENT OF SEYMOUR H. KNOX

I, Seymour H. Knox, of the City of Buffalo, County of Erie, and State of New York, being of sound mind and memory, do hereby make, publish, and declare this my last Will and Testament, in manner following, that is to say:

ARTICLE FIRST. I direct my executors hereinafter named to pay all my lawful debts and funeral expenses. I direct my executors hereinafter named to pay from the funds in my estate any transfer tax or taxes, or any collateral inheritance, succession or legacy tax or taxes imposed by law at the time of my death, upon any and all property, or interest therein, passing under and by virtue of the terms of this my last Will and Testament, and

I will and direct that all gifts, bequests, and devises herein mentioned shall be paid at the net amount herein stated without any deduction on account of any such tax or taxes.

43 ARTICLE SECOND. I hereby authorize and direct my executors hereinafter named to cause to be erected in Forest Lawn Cemetery, in the City of Buffalo, N. Y., a suitable monument or mausoleum at an expense of not exceeding Fifty thousand dollars ($50,000) therefor, to be paid from the funds of my estate.

ARTICLE THIRD. I give and devise unto my wife, Grace M. Knox, the house, stable, land and premises and their appurtenances, situate on the easterly side of Delaware Avenue between Utica and Ferry Streets in the City of Buffalo, and now occupied by my wife and myself as a residence; to have and to hold the same unto my said wife, Grace M. Knox, and to her heirs and assigns forever.

I also give and bequeath unto my said wife, Grace M. Knox, all the pictures, furniture, rugs, books, ornaments, tableware, plate, silver, linen, and all other household furniture, and equipment, all jewelry and clothing, and also all horses, carriages, automobiles and stable and automobile equipment owned by me at the time of my death (excepting only trotting-bred horses, sulkies, harnesses, and other equipment hereinafter mentioned and referred to in Article Eighth hereof).

ARTICLE FOURTH. I also give and bequeath unto my wife, Grace M. Knox, the sum of Two hundred fifty thousand dollars ($250,000) and I will and direct that said legacy be paid to my said wife in securities owned by me at the time of my death to be selected by her and taken by her at their appraised value.

ARTICLE FIFTH. I give and bequeath to my brother, Burtis L. Knox now residing at Chaffee, Erie County, N. Y., fifty

44 (50) shares of the common capital stock of F. W. Woolworth Company, a corporation organized under the laws of the State of New York; and in addition thereto, I give and bequeath to my said brother, Burtis L. Knox, an annuity of Twelve hundred dollars ($1,200) and direct my executors hereinafter named to pay over said annuity to my said brother in quarterly payments of Three hundred dollars ($300) each during his natural life. I direct my said executors to set aside the sum of Thirty thousand dollars ($30,000) for the purpose of producing said annuity and at the death of my said brother, I give, devise and bequeath the property so set aside to produce said annuity unto my son, Seymour H. Knox, if he be then living; if not, to my daughters, Dorothy Knox and Marjorie Knox, to be divided between them, share and share alike.

Notwithstanding the foregoing provisions, I further will and direct that if on the 1st day of January, in the year Nineteen hundred and thirty-three, my said brother, Burtis L. Knox, shall be then living, that the annual payments to him shall then cease, and in that event I give, devise, and bequeath to said Burtis L. Knox, all of the property and estate then held to produce such income for his benefit, pursuant to the provisions of this Article Fifth of my last Will and Testament.

ARTICLE SIXTH. I give and bequeath to my brother, Henry D. Knox, of the City of Buffalo, three hundred (300) shares of the common capital stock of F. W. Woolworth Company. I make no other provision for the benefit of my said brother, Henry D. Knox, for the reason that I have during my lifetime, made other provision for his benefit.

ARTICLE SEVENTH. I give and bequeath unto Catherine Avery, cousin of my wife, who now resides at Los Angeles,
45 California, One hundred (100) shares of the common capital stock of said F. W. Woolworth Company.

ARTICLE EIGHTH. I give and bequeath unto Benjamin F. White of East Aurora, five (5) of the trotting-bred horses owned by me at the time of my death; said horses to be selected by said Benjamin F. White. I also give and bequeath to said Benjamin F. White necessary harnesses for said horses so selected by him and two sulkies; said harnesses and sulkies to be selected by him from the harnesses and sulkies owned by me at the time of my death, and that the remaining trotting-bred horses, sulkies, and harnesses be sold as hereinafter provided.

ARTICLE NINTH. I give and bequeath to the Home for the Friendless, located in the City of Buffalo, N. Y., One hundred (100) shares of the common capital stock of said F. W. Woolworth Company; and to the Charity Organization of Buffalo, one hundred (100) shares of the common capital stock of said F. W. Woolworth Company.

ARTICLE TENTH. I give and bequeath unto the Buffalo Fine Arts Academy, Five hundred (500) shares of the common capital stock of said F. W. Woolworth Company.

ARTICLE ELEVENTH. I give and bequeath to the Methodist Episcopal Church located at Russell, St. Lawrence County, N. Y., Fifty (50) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following purposes: the said shares of stock so bequeathed to be held or sold and the proceeds invested and, from time to time, re-invested, and the net income thereon used to assist in defraying the curent expenses of said church.

46 ARTICLE TWELFTH. I give and bequeath unto William T. Damon, now in my employ, the full amount due or to

become due to me upon a certain mortgage made by him to me and covering property situate on the shore of Lake Erie and in the Province of Ontario, Canada, and I direct my executors to cancel and discharge said mortgage.

ARTICLE THIRTEENTH. I give and bequeath unto Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, and doing business in the City of Buffalo, N. Y., and to Walter P. Cooke of the City of Buffalo, N. Y., Two thousand (2,000) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold and, from time to time, in their discretion, to sell the same or portions thereof, and to invest and reinvest the same, or the proceeds thereof, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund, and to pay over the net income arising therefrom in quarterly payments, to my sister, Carrie E. Fowler, during her natural life, and at the death of my said sister, Carrie E. Fowler, I give, devise, and bequeath the property then constituting such trust fund unto such person or persons and in such proportions as shall have been in that behalf appointed in and by the terms of the last Will and Testament duly executed of my said sister, Carrie E. Fowler, and in the event that my said sister, Carrie E. Fowler, shall fail to exercise such power of appointment, then at the death of my said sister, I give, devise, and bequeath the property constituting such trust fund unto her sons, Seymour K. Fowler and Raymond P. Fowler, share and share alike. In case of the prior death of either of said sons,
47 the issue of said deceased son to take the share to which the parent would have been entitled if living. And in case of the prior death of both Seymour K. Fowler and Raymond P. Fowler leaving no issue them surviving, I give, devise, and bequeath the property constituting said trust fund to my heirs.

Notwithstanding the foregoing provision, I further will and direct that in event that my said sister, Carrie E. Fowler, is living on the 1st day of January, in the year Nineteen hundred and thirty-three, the trust hereby created for her benefit shall then terminate, and I give, devise, and bequeath to my said sister, Carrie E. Fowler, in that event, all of the property then constituting said trust fund.

ARTICLE FOURTEENTH. I give and bequeath unto my nephew, Seymour K. Fowler, son of my sister, Carrie E. Fowler, Three Hunderd (300) shares of the common capital stock of said F. W. Woolworth Company.

ARTICLE FIFTEENTH. I give and bequeath unto said Bankers Trust Company of Buffalo, a corporation organized under the

laws of the State of New York, and Walter P. Cooke of the City of Buffalo, N. Y., Three hundred (300) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold, and from time to time, in their discretion, to sell the same or portions thereof and to invest and reinvest the same or the proceeds thereof, and to collect the rents, income, issues and profits on the property from time to time constituting such trust fund and to pay over the net income arising therefrom, semi-annually, unto my nephew, Raymond P. Fowler, son of my sister, Carrie E. Fowler, until he shall arrive at the age of
48 twenty-five (25) years, at which time I give and bequeath one-half of said trust fund to my nephew, Raymond P. Fowler, and direct my said trustees to pay over one-half of such trust fund to him and thereafter to pay to my said nephew, Raymond P. Fowler, the net income arising from the balance of said trust fund until he shall arrive at the age of thirty (30) years, at which time, I give, devise, and bequeath the balance of said trust fund to my said nephew, Raymond P. Fowler, and direct my said trustees to transfer and convey said property then constituting said trust fund to him. In case of the death of said Raymond P. Fowler before he shall arrive at the age of thirty (30) years, I give, devise, and bequeath whatever property may remain in said trust fund unto his children, if any, to be divided among them, share and share alike, and if he shall leave no children then living, I give, devise, and bequeath the balance of said trust fund to his brother, Seymour K. Fowler, if he then be living; if not, I give, devise, and bequeath the balance of said trust fund to my heirs.

ARTICLE SIXTEENTH. I give and bequeath unto Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, doing business in Buffalo, N. Y., and Walter P. Cooke of the City of Buffalo, N. Y., Two hundred fifty (250) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold, and from time to time, in their discretion to sell the same or portions thereof and to invest and reinvest the same or the proceeds thereof, and to collect the rents, issues, income, and profits on the property from time to time constituting such trust fund and to pay over the net income arising
49 therefrom semiannually unto my niece, Verona Knox, daughter of my brother, Burtis L. Knox, until she shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath the property constituting said trust fund to

my said niece, Verona Knox. In case of the death of my said niece, Verona Knox, before arriving at the age of thirty (30) years, I give, devise, and bequeath the property then constituting said trust fund unto her children, if any then living, share and share alike. If she shall have no children then living, I give, devise, and bequeath said trust fund unto her sister, Ethel Knox, if she be then living; if not, then to my heirs.

ARTICLE SEVENTEENTH. I give and bequeath unto the Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, and doing business at Buffalo, N. Y., and Walter P. Cooke of the City of Buffalo, N. Y., Two hundred fifty (250) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold, and, from time to time, in their discretion, to sell the same or portions therof and to invest and reinvest the same or the proceeds thereof, and to collect the rents, income, issues, and profits on the property, from time to time, constituting such trust fund and to pay over the net income arising therefrom semi-annually unto my niece, Ethel Knox, daughter of my brother, Burtis L. Knox, until she shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath the property constituting said trust fund to my said niece, Ethel Knox. In case of the death of my said niece, Ethel Knox, before arriving at the age of thirty (30) years, I give, devise, and bequeath the property constituting said trust fund unto her children, if any, share and share alike. If she shall have no children then living, I give, devise, and bequeath said trust fund unto her sister, Verona Knox, if she be then living; if not, then to my heirs.

ARTICLE EIGHTEENTH. I give and bequeath unto each of the children of my brother, Henry D. Knox, who may be living at the time of my death One hundred (100) shares of the common capital stock of said F. W. Woolworth Company.

ARTICLE NINETEENTH. I give and bequeath unto each household servant employed in or about my homes at Buffalo and East Aurora, including chauffeurs and stable employees, who have been in my employ at the time of my death for upwards of one (1) year, the sum of One hundred dollars ($100) to each such servant for each and every year of such continuous employment prior to the date of my death, and I will and direct that the determination of my executors as to who is entitled to receive the legacy under this Article of my last Will and Testament and the period of employment of each such person, and the amount of the legacy hereunder which

each is to receive, shall be final and conclusive and binding upon all parties.

ARTICLE TWENTIETH. I give and devise unto my son, Seymour H. Knox, the real property constituting my farm and summer home located at East Aurora, N. Y., together with the residence and all barns and other buildings and structures situated thereon and all stable and farming equipment used or purchased for use in connection with the same.

ARTICLE TWENTY-FIRST. In determining the amount of my residuary estate for the purpose of making distribution
51 thereof as hereinafter provided, I direct that there be first set aside the following property, to wit:

All the shares of the capital stock owned by me at the time of my death in the following corporations: The Marine National Bank of Buffalo, a banking corporation having its principal place of business in the City of Buffalo, N. Y.; Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, having its principal place of business in the City of Buffalo, N. Y.; The Central National Bank of Buffalo, a banking corporation having its principal place of business in the City of Buffalo, N. Y.; Bankers Trust Company, a corporation organized under the laws of the State of New York, having its principal place of business in the City of New York, N. Y.; Irving National Bank, a corporation having its principal place of business in the City of New York, N. Y.; The Chase National Bank, a corporation having its principal place of business in the City of New York, N. Y.; which capital stock I have by subdivision (C) of this Article numbered "Twenty-first" of this my last Will and Testament, given and bequeathed to my brother, Henry D. Knox and Walter P. Cooke, in trust, for the benefit of my son, Seymour H. Knox.

All the rest, residue and remainder of my property and estate, real, personal, and mixed, of every name, nature, and description, and wher'sover situate, but not including, however, the shares of the capital stock of the six corporations mentioned in the first paragraph of this Article Twenty-first of my last Will and Testament, I give, devise, and bequeath as follows:

(A) Forty (40) per cent thereof (not including, however, the shares of the capital stock of the six corporations
52 mentioned in the first paragraph of this Article Twenty-first), I give, devise, and bequeath unto my brother, Henry D. Knox, and Walter P. Cooke, both of the City of Buffalo, N. Y., in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold, and from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on

the property from time to time constituting such trust fund and to pay over the net income arising therefrom quarterly unto my wife, Grace M. Knox, for and during the term of her natural life. At the death of my said wife, I give, devise, and bequeath one-half (½) of the property then constituting said trust fund unto such person or persons, corporation or corporations, and in such proportions as shall have been in that behalf appointed in the last Will and Testament, duly executed, of my said wife, Grace M. Knox; the remaining one-half (½) of the property constituting said trust fund, and in case my said wife shall have failed to exercise the power of appointment in reference to one-half (½) of said trust fund above mentioned, the entire property then constituting said trust fund, I will and direct shall be divided into three (3) equal parts or portions; one part or portion to be held by my said trustees for the benefit of my daughter, Dorothy Knox, and the net income thereon paid over to her semi-annually, until she shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath said part or portion to my said daughter, Dorothy Knox; one part or portion to be held by my said trustees for the benefit of my son, Seymour H. Knox, and the net income thereon paid over to him semiannually, until he shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath said part or portion to
53 my said son, Seymour H. Knox; one part or portion to be held by my said trustees for the benefit of my daughter, Marjorie Knox, and the net income thereon paid over to her, semiannually, until she shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath said part or portion to my said daughter, Marjorie Knox. In case of the death of either or any of my said children before reaching the age of thirty (30) years, I give, devise, and bequeath the trust fund so held for the benefit of either or any of my said children, unto the issue of such deceased child or children, share and share alike, and in case either or any of my said children shall die before reaching the age of thirty (30) years leaving no issue surviving, then I give, devise, and bequeath the property constituting said trust fund so held for the benefit of such deceased child or children unto my children who may then be living, to be divided between them share and share alike.

In the event that at the time of the death of my said wife Grace M. Knox, any or all of my children shall be less than twenty-one (21) years of age, I direct that only so much of the income payable to such child or children, shall be used for the support and education of such child or children as my trustees shall deem wise and proper and that the remainder of said income shall be accumulated during the minority of such

child or children and paid over when each such child arrives at the age of twenty-one (21) years.

(B) Twenty (20) per cent. of all the rest, residue, and remainder of my said estate (not including, however, the shares of the capital stock of the six corporations mentioned in the first paragraph of this Article Twenty-first) I give, devise and bequeath to my brother Henry D. Knox and Walter P. Cooke, both of the City of Buffalo, in trust nevertheless, for the following uses and purposes, to wit:

54 To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my trustees shall seem wise and proper toward the support, maintenance and education of my daughter, Dorothy Knox, until she shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over such accumulated income to her when she shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income to my said daughter Dorothy Knox, until she shall arrive at the age of twenty-eight (28) years, at which time I give, devise, and bequeath to my said daughter, Dorothy Knox, one-half (½) of the property then constituting said trust fund and I direct my said executors to pay over to my daughter, Dorothy Knox, the net income on the remaining one-half (½) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise and bequeath the remaining part of said trust fund to my said daughter, Dorothy Knox, and to her heirs and assigns forever.

In the event that my said daughter, Dorothy Knox, shall die before reaching the age of thirty-five (35) years, I give, devise, and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Dorothy Knox, if any, surviving her, to be divided among them, share and share alike. In case there be no issue her surviving, then I give, devise and bequeath said trust fund unto her heirs.

(C) Twenty (20) per cent. of said rest, residue and remainder of my property and estate, I give, devise and bequeath

55 unto my brother, Henry D. Knox and Walter P. Cooke, both of the City of Buffalo, N. Y., together with all of the capital stock owned by me at the time of my death in the following corporations, to wit: The Marine National Bank of Buffalo, a banking corporation having its principal place of business in the City of Buffalo, N. Y.; Bankers Trust Company of Buffalo, a

corporation organized under the laws of the State of New York, having its principal place of business in the City of Buffalo, N. Y.; The Central National Bank of Buffalo, a banking corporation having its principal place of business at Buffalo, N. Y.; Bankers Trust Company, a corporation organized under the laws of the State of New York, having its principal place of business in the City of New York, N. Y.; Irving National Bank, a corporation having its principal place of business in the City of New York, N. Y.; and The Chase National Bank, a corporation having its principal place of business in the City of New York, N. Y., in trust nevertheless, for the following uses and purposes to wit:

To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting said trust fund and to pay over so much of the net income thereon as to my said trustees shall seem wise and proper toward the support, maintenance and education of my son, Seymour H. Knox, until he shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during his minority for his benefit, and to pay over such accumulated income to him when he shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income on said trust fund until he shall arrive at the age of twenty-five (25) years, at which time, I give, 56 devise, and bequeath to my said son, Seymour H. Knox, a portion of said trust fund, to wit, Five hundred thousand dollars ($500,000), and direct my executors to pay over said sum of Five hundred thousand dollars ($500,000) to my said son, Seymour H. Knox, and thereafter to pay over the net income on the trust fund remaining in their hands to my said son until he shall arrive at the age of thirty (30) years, at which time I give, devise and bequeath one-half (½) of the trust fund then remaining in the hands of my said trustees to my said son, Seymour H. Knox, and I direct my said trustees to transfer and convey the same to him and thereafter to pay over the net income arising on the trust fund remaining in their hands to my said son, Seymour H. Knox, until he shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the balance of said trust fund unto my said son, Seymour H. Knox. In case of the death of my said son, Seymour H. Knox, prior to the time when he shall arrive at the age of thirty-five (35) years, I give, devise, and bequeath all of said trust fund which may not then have been paid over to him, or to the possession of which he may not at the time of his death have been entitled, unto his issue, if any, him surviving, to be divided among them, share and share alike. And in the event that there be no issue him surviving, I give,

devise, and bequeath the balance of said trust fund unto his heirs.

(D) Twenty (20) per cent. of all the rest, residue and remainder of my said estate (not including, however, the shares of capital stock of the six corporations mentioned in the first paragraph of this Article Twenty-first) I give, devise, and bequeath to my brother, Henry D. Knox and Walter P. Cooke, both of the City of Buffalo, in trust nevertheless, for the following uses and purposes, to wit:

57 To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my said trustees shall seem wise and proper toward the support, maintenance and education of my daughter, Marjorie Knox, until she shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over the accumulated income to her when she shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income to my said daughter, Marjorie Knox, until she shall arrive at the age of twenty-eight (28) years, at which time, I give, devise and bequeath to my said daughter, Marjorie Knox, one-half (½) of the property then constituting said trust fund and I direct my said trustees to pay over the net income on the remaining one-half (½) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise and bequeath the remaining part of said trust fund to my said daughter, Marjorie Knox, and to her heirs and assigns forever.

In the event that my said daughter, Marjorie Knox, shall die before reaching the age of thirty-five (35) years, I give, devise and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Marjorie Knox, if any, surviving her, to be divided among them, share and share alike. And in case there be no issue her surviving, then I give, devise and bequeath said trust fund unto her heirs.

ARTICLE TWENTY-SECOND. I hereby grant unto the trustees of the various trusts created by this my last Will and Testa-
58 ment, with the same force and effect as though these provisions were repeated separately in respect to each of said trusts, full power and authority to invest and, from time to time, reinvest all of the property and funds coming into the hands of my various trustees, in such property, stock, bonds and other securities as to the trustees of each said trust shall seem wise

and proper, whether or not such investments shall be those which, under the laws of the State of New York, an executor and trustee is permitted to make, and without regard to limitations or restrictions, hereby giving and granting unto such trustees, full power and authority to receive from my executors and to retain as a part of the trust funds in their hands any and all stocks, bonds or other securities, which may form a part of my estate at the time of my death, and which they shall receive from the executors thereof in the course of the distribution of my said estate, hereby granting unto my said trustees full power and authority to exchange any stocks, bonds or other securities belonging to any trust for any stocks, bonds or other property upon any consolidation, merger or re-organization of any of the companies whose stocks or securities are so held by me at the time of my death, or which may form a part of any such trust fund at any time thereafter, and I hereby give and grant unto my said trustees full power and authority to sell, lease, convey or dispose of any and all property, real, personal or mixed, which may at any time form a part or any or all of said trust funds, and to execute leases, conveyances and transfers thereof, on such terms and conditions as to them shall seem wise and proper.

It is my wish, however, which I hereby express to my trustees, that within five (5) years after my death the property constituting the various trusts hereby created shall be so invested
59 that at least fifty (50) per cent. in value of each of said trust funds shall be invested in securities then constituting legal investments for savings banks, executors or trustees, or in unencumbered real property situate in the retail business districts of cities of at least two hundred thousand (200,000) population, unless in the opinion of my said trustees additional time is required to accomplish such investments, and then, and in that event, I desire that such investments be made at an early date after the expiration of said five (5) years.

ARTICLE TWENTY-THIRD. In addition to the powers hereinbefore conferred upon the trustees of the various trusts created by the terms of this my last Will and Testament, I hereby grant full power and authority to my said trustees to invest portions of the trust funds of any of the trusts herein created in unencumbered real estate situate in the retail business districts of any cities in the State of New York, having a population of more than two hundred thousand (200,000), provided, however, that not more than twenty (20) per cent. of the value of any trust fund shall be at any one time so invested in real property.

ARTICLE TWENTY-FOURTH. I further will and direct that in the event that I shall own any or all of the following parcels of real

estate, now owned by me, at the time of my death, that the same may be transferred by my executors to the trustees of any of the trusts created by the provisions of Article Twenty-first hereof, and accepted by said trustees as a part of said trust funds at the valuations fixed by the appraisers in the proceedings for determining the amount of the transfer tax under the laws of the State of New York:

The property known as Nos. 416–418 Main Street in the City of Buffalo, N. Y.;

60 The property known as Nos. 446–448 Main Street in the City of Buffalo, N. Y.;

The property now owned by me in the City of Kansas City, Mo.;

The property now owned by me in the City of Toledo, O.;

The property now owned by me in the City of Akron, O.

It is my suggestion to my executors and trustees, although not binding in case changed conditions shall render it unwise, that the property known as Nos. 416–418 Main Street, in the City of Buffalo, N. Y., shall become a part of the trust created for the benefit of my daughter, Dorothy Knox, and that the property known as Nos. 446–448 Main Street, in the City of Buffalo, N. Y., shall become a part of the trust created for the benefit of my daughter, Marjorie Knox.

ARTICLE TWENTY-FIFTH. I hereby further authorize and empower my said executors, in the administration of my said estate to determine and make the division of my property and estate unto the various trust funds created by the provisions of Article Twenty-first hereof, as in their judgment shall seem wise and proper, and I further authorize any of my said trustees in the event of a division being necessary of any trust funds hereby created in accordance with the terms and direction of this Will, to make such division both of real and personal property, and to execute such conveyances and transfers as may be necessary to effect the same. The action of my executors and any of said trustees, pursuant to the authority of this my last Will and Testament, to be binding upon all parties interested in my estate and in any such trust fund. I further will and direct that should any parcel of real estate owned by me at the time of my death become a part of any of the trust funds created by the terms

61 of Article Twenty-first of this my last Will and Testament at the appraised value thereof, as hereinbefore stated, that the trustees of the remaining trusts created by the terms of said Article Twenty-first hereof shall, upon request, execute proper and suitable conveyances of their interest in said parcel or parcels of real estate, so as to effectually vest the title thereof

in the trustees of the trust fund of which said parcel of rea estate may become a part.

ARTICLE TWENTY-SIXTH. I hereby nominate, constitute, and appoint my wife, Grace M. Knox, to be the executrix, and my brother, Henry D. Knox, and Walter P. Cooke, both of the City of Buffalo, to be the executors, of this my last Will and Testament, hereby giving and granting to my executors full power and authority to sell and convey any and all property, real, personal or mixed, of which I may die seized or possessed, or in which I may have any interest. I hereby will and direct that no bond or other security shall be required of my said executors or of any of the trustees of the various trusts created by this my last Will and Testament. I hereby will and direct that my executors shall have three (3) years from and after my decease in which to settle my estate and to distribute the same in accordance with the provisions hereof, and may retain from time to time as a part of my estate any and all real property, stocks, bonds, securities, and other property, which may form a part of my estate at the time of my death, hereby granting unto my said executors full power and authority to exchange such stocks, bonds, or other securities for any other stocks, bonds, or other porperty upon any consolidation, merger, or other reorganization of any of the companies whose stocks or securities are so held.

I hereby authorize my executors and trustees to pay out of the income and revenues of my said estate, or of each trust fund
62 herein created, all taxes or assessments which shall be imposed or assessed upon the real or personal property belonging to my estate or to any such trust fund, all amounts necessary for insurance premiums, repairs, and generally all other expenses necessary or proper in the management or preservation of such trust funds or estate, each such trust fund bearing, so far as practicable, its own burden.

I further will and direct that in view of the provisions herein contained for her benefit, that my wife, Grace M. Knox, serve as executrix of this my last Will and Testament, without fees, commissions, or compensation, and I further will and direct that in lieu of the commissions and compensation provided by law, that each of my acting executors, administrators with the will annexed, or trustees, whether herein appointed or appointed by the court, excepting only the Bankers Trust Company of Buffalo, as Trustee of the various trusts created by Articles Thirteenth, Fifteenth, Sixteenth, and Seventeenth hereof, shall during his service as such receive an annual compensation of Twelve thousand dollars ($12,000) each, to be paid out of the income of my estate and the trust funds herein contained and apportioned ratably

between the said estate and the said trust funds created by the provisions of Article Twenty-first hereof in substantial proportion to the value of the property contained in each, from time to time, such sum to be received in full payment for his services as such executor, administrator, and trustee under this Will, and to cover the entire services of each, both as executor, administrator, and trustee. I hereby expressly will and direct that the appointment of any other executor, trustee, or administrator with the will annexed which may be made by any court, shall be upon the express condition that every such executor, trustee, or administrator shall at the time of his appointment, accept the
63 compensation above provided for his services, in lieu of commissions or compensation provided by law. I will and direct that the Bankers Trust Company of Buffalo in acting as trustee of Articles Thirteenth, Fifteenth, Sixteenth, and Seventeenth hereof shall receive the usual commissions for such services as allowed by law.

Any executor or trustee, however, may during the period of his administration of my estate serve as director, officer or attorney of corporations whose stocks, bonds, or other securities may form a part of my estate, or any trust fund, and may be compensated for such service by such corporations.

ARTICLE TWENTY-SEVENTH. I hereby will and direct that any reference contained in this my last Will and Testament to my executors or to my trustees shall be deemed and construed to refer with equal force to the survivor or survivors of any of my executors or to the survivor or survivors of any trustees of any trust fund herein mentioned, and to any additional executors or trustees when their appointment is effected. And I hereby nominate, constitute, and appoint my son, Seymour H. Knox, to be one of the executors of this my last Will and Testament and one of the trustees of every trust herein created upon his reaching the age of twenty-one (21) years and with the same force and effect as though he were now included as an executor and as a trustee of each of the trusts hereby created, and subject to the same provisions as to compensation as herein provided for my executors, other than my wife and the Bankers Trust Company of Buffalo.

ARTICLE TWENTY-EIGHTH. The provisions herein contained for the benefit of my said wife, Grace M. Knox, are to be
64 accepted by her in lieu of any dower or right of dower in any real property of which I may die seized or possessed, or in which I may have any interest, and are also to be received by her in lieu of any right to receive fees, commissions or other compensation as executrix of this my last Will and Testament.

ARTICLE TWENTY-NINTH. I hereby will and direct that no one

of my children shall be charged with any advance or advancements made by me to such children during my lifetime.

ARTICLE THIRTIETH. It is my desire, if my executors approve, that all of my trotting-bred horses, harnesses and sulkies, used in connection therewith, owned by me at the time of my death, excepting only such as may be selected by Benjamin F. White, pursuant to the provisions of Article Eighth hereof, be sold by my executors at the Fasig-Tipton Sales in New York City.

ARTICLE THIRTY-FIRST. I will and direct that the income on the trusts created by Article Twenty-first of this will shall commence from the time of my death, and I authorize and direct my executors to make payments on account of said income in their discretion prior to the creation of the trusts, which payments shall be accepted by the beneficiaries in lieu of corresponding payments from the trustees.

ARTICLE THIRTY-SECOND. I direct that my executors be not required to file any inventory of my said estate.

I direct my executors to make, from time to time, at the request of any of the beneficiaries of any of the trusts herein created, semi-annual statements certified by them, showing as to each beneficiary the condition of the trust estate in which he or she is interested, and the receipts, disbursements, sales and investments in connection therewith.

65

ARTICLE THIRTY-THIRD. I hereby nominate, constitute, and appoint my wife, Grace M. Knox, to be the Testamentary Guardian of my three children, Dorothy Knox, Seymour H. Knox, and Marjorie Knox.

ARTICLE THIRTY-FOURTH. In case for any reason any legacy or devise herein contained shall lapse or shall become, for any reason whatever, incapable of performance, then and in that event, I give, devise, and bequeath such legacy and devise of real estate, in case any part of it shall consist of real estate, to my said wife, Grace M. Knox, knowing that she will, so far as possible, carry out my express desires in relation to the same.

ARTICLE THIRTY-FIFTH. I hereby revoke and forever annul any and all other will or wills and codicils thereto by me at any time made.

In witness whereof, I have hereunto set my hand and seal this twelfth day of May, in the year of our Lord one thousand nine hundred and fifteen (1915).

SEYMOUR H. KNOX [SEAL]

The foregoing instrument, consisting of twenty-three (23) pages, was on the day of the date therof, signed, sealed, published, and declared by the Testor therein named, as and for his

last Will and Testament, in the presence of us and each of us, who, at his request and in his presence and in the presence
66 of each other, have hereunto set our names as attesting witnesses thereto.

DAN'L J. KENEFICK,
Residing at Buffalo, N. Y.

GUY WELLMAN,
Residing at Buffalo, N. Y.

CHARLES H. TAYLOR,
Residing at Buffalo, N. Y.

67 *Respondent's exhibit A*

At a Surrogate's Court held in and for the County of Erie, State of New York, at the Surrogate's Office, in the City of Buffalo, in said County, on the 24th day of May 1921.

Present: Hon. LOUIS B. HART, Surrogate.

In the Matter of the Judicial Settlement of the Accounts of Grace M. Knox, Henry D. Knox, and Walter P. Cooke, as Executors of the Last Will and Testament of Seymour H. Knox, Deceased.

Grace M. Knox, Henry D. Knox, and Walter P. Cooke as Executors of the Last Will and Testament of Seymour H. Knox, late of the City of Buffalo, in said county, deceased, having heretofore presented to this court their petition praying for a judicial settlement of their accounts as such executors, dated December 20, 1920, and this court having thereupon duly issued a citation requiring the persons interested in the estate of said deceased named in said petition to be and appear in this court on the 1st day of February 1921, at ten o'clock in the forenoon of that day and attend the judicial settlement of the account of the said executors,

68 And satisfactory proof having been filed of the due service of said citation personally within the State on Dorothy Knox Goodyear, Seymour H. Knox, Marjorie Knox, and Grace M. Knox as appears by the affidavit of William C. Warren, Jr., verified the 7th day of January 1921, presented to and filed with this court, and said petitioners having presented to and filed with this court an instrument in writing signed by Burtis L. Knox, legatee, and a person interested in the estate of said deceased, acknowledged and approved as required by law, in which he waives the issue and service on him of a citation to attend said judicial settlement and consents to the making of this decree;

And Louis E. Desbecker, Esq., counselor at law, having been duly appointed special guardian for said Marjorie Knox, infant, by an order duly made in this proceeding by this court, and said Louis E. Desbecker having executed his written consent, to act as such special guardian, and having verified the usual affidavit of his ability to act as such special guardian and said consent and affidavit having been duly filed with said court in this proceeding, and this proceeding having been duly and regularly adjourned to this day and this day appeared the said petitioners in person and by Daniel J. Kenefick, Esq., their attorney, and said Marjorie Knox having appeared by said Louis E. Desbecker, her special guardian, and by Grace M. Knox, her mother and guardian, and said Grace M. Knox, Henry D. Knox, and Walter P. Cooke as such executors having presented and filed their account, together with vouchers in support thereof, and said Louis E. Desbecker having executed his consent and recommendation in writing to the effect that the account submitted by the executors should be passed and judicially settled as filed and
69 that this decree submitted to him is in all respects satisfactory, which consent and recommendation is herein attached and made a part of this decree.

Now on motion of Daniel J. Kenefick, Esq., attorney for said executors, and after hearing the proofs and allegations of the parties and examining said account and due deliberation having been had thereon,

I. It is ordered, adjudged, and decreed that the account of said Grace M. Knox, Henry D. Knox, and Walter P. Cooke as such executors, dated December 20, 1920, be and the same hereby is finally and judicially settled and allowed as filed and the Surrogate makes and records the following summary thereof:

The executors are debited and credited as follows:

DEBIT

With amount of Schedule A	$26,233,760.31

CREDIT

With amount of Schedule B	$20,671,098.49	
With amount of Schedule C	1,172,186.00	
With amount of Schedule D	551,755.95	
With amount of Schedule E	3,493,406.83	
		25,888,447.27
		$345,313.04

II. And it is further ordered that out of said balance the said executors pay to Louis E. Desbecker, Esq., the said special guardian, the sum of $5,000.00 hereby awarded him in full of his compensation for services rendered in this proceeding.

70 III. And it appearing to the satisfaction of this court that the executors were authorized and directed by Article Second of the will as the testator to cause to be erected in Forest Lawn Cemetery, in the City of Buffalo, N. Y., a suitable monument and mausoleum at an expense of not exceeding $50,000, and that pursuant to said authority and direction, the executors have caused to be erected in Forest Lawn Cemetery in the City of Buffalo, N. Y., a mausoleum at an expense of $25,345.83,

It is ordered adjudged, and decreed that the action of the executors in caus g said mausoleum to be erected and in expending therefor the um of $25,345.83 be and the same hereby is ratified and approved.

IV. And it appearing to the satisfaction of this court that the testator by the Eleventh clause of his will bequeathed to the Methodist Episcopal Church located at Russell, St. Lawrence County, New York, fifty shares of the common capital stock of F. W. Woolworth Company in trust for the following purposes, the shares of stock so bequeathed to be held or sold and the proceeds invested and from time to time reinvested and the net income thereon used to assist in defraying the current expenses of said church; and that in accordance with said bequest the executors on or about the 14th day of March 1916, transferred fifty shares of the comon capital stock of the F. W. Woolworth Company to The Board of Trustees of the Methodist Episcopal Church of Russell, N. Y., upon said corporation entering into an agreement under seal to hold the same in trust for the purpose and upon the terms and conditions set forth in Article Eleventh of the will of the testator,

71 It is ordered, adjudged, and decreed that the action of the executors in transferring and delivering said stock to said corporation upon its executing said agreement, be and the same hereby is ratified and approved.

V. And it appearing that by the Fifth Article of the will of the testator, he had bequeathed an annuity of $1,200 per year to his brother, Burtis L. Knox, and directed his executors to pay over said annuity to said Burtis L. Knox in quarterly payments of $300 during his natural life, and that the testator directed his executors to set aside the sum of $30,000 for the purpose of producing said annuity and that at the death of said Burtis L. Knox, the testator devised and bequeathed the property so set aside to produce said annuity to his son, Seymour H. Knox, if he be then living, if not, to his daughters, Dorothy Knox and Marjorie Knox, to be divided between them share and share alike; and that he further provided that notwithstanding the foregoing provisions, in case said Burtis L. Knox should be living on the 1st day of January 1933, that in that event all the prop-

erty held to provide such annuity should become the property of said Burtis L. Knox.

It is further ordered, adjudged, and decreed that said executors be and they hereby are ordered and directed to set aside $30,000 and to hold and invest the same for the purposes and upon the terms and conditions set forth in Article Fifth of the will of the testator and that such sum be deemed to have been set aside as of the death of the testator and the annual payment of $1,200 made in each year by the executors to said Burtis L. Knox shall be accepted by him with the same force and effect as though paid for the income derived from said sum of $30,000.

72 VI. The Surrogate notes that the trustees of the various trusts created by the will of the testator, including Seymour H. Knox, now of full age, have duly executed their oaths and consents to act as trustees of the several trusts, and that the same are on file in this court, and that Seymour H. Knox, having become of age has qualified as executor by executing his oath of office which is on file in this office.

VII. And it appearing from the account to the satisfaction of this court that the total amount of income received by the executors from the time of their appointment to the date of said account is $6,366,973.35, and that the expenses of administration, executors' compensation, taxes, etc., properly deductible therefrom amount to $538,912.36 leaving a net income of $5,828,860.99; and it further appearing that of said amount the sum of $1,109,896.89 represents income on the bank stock specifically bequeathed in trust for Seymour H. Knox by paragraph C of Article Twenty-first of the will of the testator; and it further appearing that the balance of the net income after deducting an annuity of $1,200 per year payable to Burtis L. Knox should be divided as follows: Grace M. Knox, 40%; Dorothy Knox Goodyear, 20%; Seymour H. Knox, 20%; and Marjorie Knox, 20%, and that during the period embraced in this accounting the whole of said income has not been so distributed and that the said parties are entitled to interest on the undrawn portion of their distributive shares thereof as follows:

Seymour H. Knox	$141,105.49
Grace M. Knox	56,453.48
Dorothy Knox Goodyear	46,789.79
Marjorie Knox	71,335.96
Total	$315,684.72

73 which said amount, together with said sum of $1,109,986.89 payable to Seymour H. Knox as aforesaid should be deducted from said net income leaving a balance of $4,402,479.38 to be distributed as follows:

40% to Grace M. Knox	$1,760,991.75
20% to Seymour H. Knox	880,495.87
20% to Dorothy Knox Goodyear	880,495.88
20% to Marjorie Knox	880,495.88

And it further appearing that the payments on account of income during the period covered by this accounting are as follows:

Grace M. Knox	$1,319,979.39
Seymour H. Knox	669,105.66
Dorothy Knox Goodyear	449,774.67
Marjorie Knox	260,422.11

And it further appearing that during the period covered by this accounting the executors have expended certain moneys for bank stocks for Seymour H. Knox, having in his behalf exercised certain rights to purchase stock coming to them by virtue of the holdings of stocks specifically bequeathed for him and that the amount of money so invested less the cash distribution of principal received by virtue of said holdings, amounts to $41,512.98, which should be deducted from income due him.

And it further appearing that the amount now due to each of said interested parties on account of income to the date of the report is as follows:

74

Grace M. Knox 40% of net income	$1,760,991.75
Interest	56,453.48
	1,817,445.23
Less amount drawn	1,319,979.39
Balance due	$497,465.84
Seymour H. Knox 20% of net income	880,495.87
Interest on undrawn income	141,105.49
Bank dividends	1,109,896.89
	2,131,498.25
Less amount drawn	669,105.66
Balance	1,462,392.59
Less bank investments	41,512.98
Balance due	1,420,879.61
Dorothy Knox Goodyear 20% of net income	$880,495.88
Interest on undrawn income	46,789.79
	927,285.67
Less amount drawn	449,774.67
Balance due	$477,511.00
Marjorie Knox 20% of net income	$880,495.88
Interest on undrawn income	71,335.96
	951,831.84
Less amount drawn	260,422.11
Balance due	$691,409.73

75 It is further ordered, adjudged, and decreed that the executors pay to Grace M. Knox, Seymour H. Knox, Dorothy Knox Goodyear, and Marjorie Knox, the above mentioned balances in full of all unpaid income and interest thereon due to the date of this accounting and that up to the sum of $477,511, being the lowest amount of said income payments due, the executors pay the same by transferring and delivering to the parties entitled thereto bonds belonging to the estate at their appraised value or cost, and that the balance of said amounts be paid in cash or at the election of the parties entitled to receive said payments in securities at their appraised value or cost, but at no lesser value than present market.

And it is further ordered, adjudged, and decreed that the above balance of $691,409.73 directed to be paid to Marjorie Knox be paid to Henry D. Knox, Walter P. Cooke, and Seymour H. Knox as Trustees for Marjorie Knox, and that the same be paid $477,511 in bonds and the balance in cash or securities as hereinabove directed.

VIII. And it appearing to the satisfaction of this Court that the sales, purchases and exchanges of properties and securities made by executors during the period embraced by this account were in accordance with the authority vested in them by the will of the testator, and were also to the best interest of said estate and the persons interested therein,

It is ordered, adjudged, and decreed that the action of the executors in making the various exchanges, purchases, and sales of properties and securities as set forth in said account be and the same hereby are ratified and approved.

76 IX. And it is further ordered, adjudged, and decreed that all payments of income made by the executors or herein directed to be made by them, shall be construed to be and shall be accepted by the various interested parties as payments of income on account of their respective interests in the estate and in the trusts created for their benefit with the same force and effect as though paid to them by the Trustees named in said Last Will and Testament of Seymour H. Knox, deceased, and said trustees shall be and they hereby are relieved and exonerated from paying to the said interested parties any income on said trust funds for the period covered by said account.

X. And it appearing by Article Twenty-fourth of the will of the testator that it was the wish of the testator that the property known as 416–418 Main Street in the City of Buffalo, New York, should become a part of the trust created for the benefit of Dorothy Knox Goodyear, and that the property known as 446–448 Main Street, Buffalo, N. Y., should become a part of the trust created for the benefit of Marjorie Knox,

It is ordered, adjudged, and decreed that the executors transfer and convey to Henry D. Knox, Walter P. Cooke and Seymour H. Knox, as Trustees for the benefit of Dorothy Knox Goodyear, pursuant to the provisions of paragraph B of Article Twenty-first of said will, said property known as 416–418 Main Street in the City of Buffalo, New York, at the value of $414,000, being the appraised value thereof.

And it is further ordered, adjudged, and decreed that the executors transfer and convey to Henry D. Knox, Walter
77 P. Cooke, and Seymour H. Knox as trustees for the benfit of Marjorie Knox, pursuant to the provisions of paragraph D of Article Twenty-first of said will said property known as 446–448 Main Street in the City of Buffalo, N. Y., at the value of $464,439.89, being the appraised value of said property plus the cost of improvements made by the executors.

XI. It is further ordered, adjudged, and decreed that the executors in their discretion distribute the balance of the real estate in their hands at the appraised value of the several parcels between the trusts created for the benefit of Grace M. Knox by the provisions of paragraph A of Article Twenty-first of the will of the testator and the trust created for the benefit of Seymour H. Knox pursuant to the provisions of Paragraph C of Article Twenty-first of the will of the testator.

And is it further ordered, adjudged, and decreed that the executors on conveying the real estate to the various trusts or so much as they may determine to convey to the trusts, shall concurrently therewith transfer to the trustees of each of said four trusts, sufficient securities belonging to the estate at their appraised value or cost to equalize the difference in the value of the parcel or parcels of real estate received by each of said trusts, to the end that the appraised value of such real estate and such securities so transferred to equalize such value shall be equal as to each of such trusts except that the trust created for the benefit of Grace M. Knox shall be twice the amount of either of the others.

XII. And it appearing further that the testator by the provisions of Article Twenty-fifth of his said will has authorized
78 and empowered his executors in the administration of his said estate to determine and make division of his property and estate among the various trust funds created by the provisions of Article Twenty-first thereof as in their judgment shall seem wise and proper.

It is further ordered, adjudged, and decreed that the executors shall from time to time as in their judgment seems wise and proper, make division of the property and estate remaining in their hands, or so much thereof as from time to time they think wise, after making provision for carrying out the terms and con-

ditions of this decree into the various trust funds created by the provisions of said last will and testament and in accordance with the terms thereof, any balance of cash or property remaining in the hands of the executors to be subject to the payment therefrom of any further debts or obligations of the testator and the expenses of administration and final distribution in accordance with the terms of said will.

And it is further ordered, adjudged, and decreed, that from and after the creation of said trust funds the executors and trustees may in their discretion apportion the expenses of administration and the other disbursements among the four trusts hereinbefore mentioned and the estate, so long as any portion of said estate remains undivided.

The Surrogate notes that the executors have this day filed in this court receipts and releases duly executed by the following named legatees showing full payment of the several specific bequests to them contained in the will of the testator: Henry D. Knox, Burtis L. Knox, Catherine Avery, The Home of the Friendless, the Charity Organization Society of Buffalo,
79 Buffalo Fine Arts Academy, William T. Damon, Seymour K. Fowler, Sherman Damon, Charles Knowlton, Bertha L. Daigler, Lucy Kranichfeld, Margaret Reilly, Benjamin F. White, (2) Paul J. Kingston, John Thoman, William Timm, Herman Timm, Edward Kingston, Louis Sissler, Charles Curtis, Charles Sissler, Aloise Burghardt; also receipt and release duly executed by Henry D. Knox, General Guardian of Priscilla Knox, Alice Knox and James H. Knox, showing full payment of the specific bequests to them contained in the will of the testator; also receipts and releases duly executed by Bankers Trust Company of Buffalo and Walter P. Cooke, as trustees, showing the receipt by them of the property bequeathed in trust by the will of the testator for Verona Knox, Ethel Knox, Carrie D. Fowler and Raymond P. Fowler; also receipt and release executed by the Board of Trustees of the Methodist Episcopal Church of Russell, N. Y., showing the receipt of the property specifically bequeathed in trust by the will of the testator, together with an agreement executed by the Board of Trustees of the Methodist Episcopal Church of Russell, N. Y., to hold said property in trust in accordance with the terms of the will of the testator.

L. B. HART, *Surrogate.*

STATE OF NEW YORK,
County of Erie, Surrogate's Office, ss:

I, George T. Vandermeulen, Clerk of the Surrogate's Court of the said county of Erie, do hereby certify that I have com-

pared the foregoing and annexed copy of Decree—in the
80 matter of the judicial settlement of the accounts of Grace M. Knox, Henry D. Knox and Walter P. Cooke, as executors of the Last Will and Testament of Seymour H. Knox, deceased with the original record thereof now remaining in this office, and have found the same to be a correct transcript therefrom, and of the whole of such original record.

[SEAL]

In witness whereof, I have hereunto set my hand and affixed the seal of said Surrogate's Court, at Buffalo, N. Y., this 12th day of December 1938.

No. 53273.

G. T. VANDERMEULEN,
Clerk of Surrogate's Court.

[Surrogate's Court, Erie County. In the Matter of the Judicial Settlement of the Accounts of Grace M. Knox and others as executors of vs. Seymour H. Knox, Deceased. Decree.]

81 Before United States Board of Tax Appeals

Docket No. 77827

[Same title.]

R. M. Andrews, Esq., John L. Kenefick, Esq., and Ernest J. Brown, Esq., for the petitioner. W. H. Schwatka, Esq., and E. L. Updike, Esq., for the respondent.

Memorandum opinion

MURDOCK: The Commissioner determined a deficiency of $35,645.83 in the petitioner's income tax for the calendar year 1930. The petitioner has waived the only assignment of error which he made to the determination of the Commissioner, and the only issues for decision are presented by the Commissioner by way of an answer in an effort to increase the deficiency which he has determined. Those issues are—first, whether the petitioner's basis for gain or loss on certain shares of stock which he sold during the taxable year was the cost of those shares to trustees under his father's will, as the Commissioner now contends, or was the fair market value of the shares at the time they were distributed to the petitioner, and, second, whether they were held by the petitioner only from the date they were received by him in the distribution, or whether, as the respondent now contends, they were held by the petitioner from the date

they were purchased by the trustees. The Board adopts as its findings of fact the stipulation filed by the parties, together with respondent's exhibit A.

82 Seymour H. Knox, the father of the petitioner, died on May 16, 1915. His will provided that the residuary estate should be divided into four parts and that one part, consisting of 20 per cent of the whole, be placed in trust for this petitioner. The will provided, with respect to the portion placed in trust for this petitioner, that it was so placed for the following uses and purposes:

"To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues and profits on the property from time to time constituting said trust fund and to pay over so much of the net income thereon as to my said trustees shall seem wise and proper toward the support, maintenance and education of my son, Seymour H. Knox, until he shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during his minority for his benefit, and to pay over such accumulated income to him when he shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income on said trust fund until he shall arrive at the age of twenty-five (25) years, at which time, I give, devise and bequeath to my said son, Seymour H. Knox, a portion of said trust fund, to wit, Five hundred thousand dollars ($500,000), and direct my executors to pay over said sum of Five hundred thousand dollars ($500,000) to my said son, Seymour H. Knox, and thereafter to pay over the net income on the trust fund remaining in their hands to my said son until he shall arrive at the age of thirty (30) years, at which time I give, devise and bequeath one-half (½) of the trust fund then remaining in the hands of my said trustees to my said son, Seymour H. Knox,

83 and I direct my said trustees to transfer and convey the same to him and thereafter to pay over the net income arising on the trust fund remaining in their hands to my said son, Seymour H. Knox, until he shall arrive at the age of thirty-five (35) years, at which time I give, devise and bequeath the balance of said trust fund unto my said son, Seymour H. Knox. In case of the death of my said son, Seymour H. Knox, prior to the time when he shall arrive at the age of thirty-five (35) years, I give, devise and bequeath all of said trust fund which may not then have been paid over to him, or to the possession of which he may not at the time of his death have been entitled, unto his issue, if any, him surviving, to be divided among them, share and share alike. And in the event that there be no issue him sur-

viving, I give, devise and bequeath the balance of said trust fund unto his heirs."

It further provided that the trustees should have full power to sell, exchange, or dispose of any property in the trust fund, and expressed the wish of the testator that within five years after his death, or as soon thereafter as possible, 50 per cent of the value of the trust fund shall be invested in securities constituting legal investments for executors or trustees or in unencumbered real property.

The trustees purchased 13,660 shares of stock of Marine Share Corporation on August 31, 1927, for $273,200, and on August 30, 1928, purchased 3,415 additional shares on rights for $102,450.

The petitioner attained the age of thirty years on September 1, 1928, and became entitled to receive and did receive on that date one-half of the trust fund then remaining in the hands of the trustees. 5,160 of the original 13,660 shares and all of
84 the 3,415 shares purchased by the trustees were delivered to the petitioner as a part of the above distribution on September 1, 1928. The fair market value of those shares on that date was $473,768.75. The petitioner exchanged those shares thereafter in a nontaxable exchange and sold the shares received in that exchange on June 10, 1930, for $287,193.67.

The Commissioner, in his determination of the deficiency, allowed the petitioner an ordinary loss of $186,575.08 on the sale. That loss was the difference between the amount realized and the fair market value of the Marine Share Corporation shares on September 1, 1928. The respondent now contends that the shares had a basis for gain or loss in the hands of the petitioner equal to the cost of the shares to the trustees and that the petitioner held the shares from the date of purchase by the trustees, so that he realized a capital gain of $79,293.58 on the sale of a part of the shares and an ordinary loss of $13,687.41 on the sale of the remainder.

The question of whether the petitioner is entitled to use as his basis the fair market value of the property at the time it was distributed to him on September 1, 1928, is decided for the petitioner on authority of Marjorie K. Campbell, 39 B. T. A. No. 133 (5/19/39) and cases there cited. The trusts in the two cases were created by the same will and are substantially identical. Here the respondent concedes that a number of cases cited in the Campbell case are against him. The next question is whether the period of holding by the trustee should be tacked on to the period that the securities were held by the petitioner for the purpose of determining whether they were capital assets under the provisions of section 101 (c) (3) of the Revenue Act of 1928. That

section contains several special provisions for tacking on to the period of holding by the taxpayer a period of holding by some other taxpayer. None of those provisions applies in the
85 present case. It seems reasonable to infer from the fact that Congress has made these special provisions but has not made any special provision to cover a case like the present, that Congress did not intend to tack on any period to the holding of a taxpayer in the situation of this one. Furthermore, no logical reason has been suggested for tacking on the period of holding by the trustee. That trustee was a different taxpayer. It had complete domination and control over the securities in question until the very moment they were distributed to this taxpayer. This taxpayer had no dominion or control over the securities and indeed no vested interest in the particular securities prior to the date of the distribution. He held the securities only from September 1, 1928. Richard Van Nest Gambrill, 38 B. T. A. 981.

Decision will be entered in accordance with the notice of deficiency.

Enter:

Entered May 19, 1939.

86 Before United States Board of Tax Appeals

Docket No. 77827

[Same title.]

Decision

The respondent on June 13, 1939, filed a proposed computation pursuant to the Board's Memorandum Opinion entered May 19, 1939. The petitioner on June 23, 1939, filed a notice of acquiescence to the respondent's computation. Therefore, it is ordered and decided, that there is a deficiency in income tax for the year 1930 in the amount of $42,842.24.

(Signed) J. E. MURDOCK,
Member, United States Board of Tax Appeals.

Enter:

Entered June 30, 1939.

87 In United States Circuit Court of Appeals for the Second Circuit

BTA Docket No. 77827

GUY T. HELVERING, Commissioner of Internal Revenue, PETITIONER ON REVIEW

v.

SEYMOUR H. KNOX, RESPONDENT ON REVIEW

Petition for review and assignments of error

Filed Sept. 22, 1939

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his Attorneys Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Claude R. Marshall, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

JURISDICTION

That the petitioner on review (hereinafter sometimes referred to as the Commissioner) is duly appointed, qualified, and
88 acting Commissioner of Internal Revenue of the United States, appointed and holding his office by virtue of the laws of the United States; that Seymour H. Knox, the respondent on review (hereinafter sometimes referred to as the taxpayer) is an individual residing in the City of Buffalo, New York; that the said Seymour H. Knox filed his Federal individual income tax return for the taxable year 1930 in the office of the Collector of Internal Revenue for the 28th District of New York, located at Buffalo, New York, which said collection district is within the jurisdiction of the United States Circuit Court of Appeals for the Second Circuit.

The Commissioner files this petition pursuant to the provisions of Sections 1001, 1002, and 1003 of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928, as amended by Section 1101 of the Revenue Act of 1932, as amended by Section 519 of the Revenue Act of 1934, and subsequent revenue acts.

II

PRIOR PROCEEDINGS

On August 15, 1934, the Commissioner of Internal Revenue, pursuant to the provisions of Section 272 (a) of the Revenue Act of 1928 as amended by Section 501 of the Revenue Act of 1934 (49 Stat. 755) sent the taxpayer by registered mail a notice of deficiency advising him that the determination of his income tax liability for the year 1930 disclosed a deficiency in the amount of $35,645.83. Thereafter, on November 12, 1934, a petition was filed by the taxpayer with the United States Board of Tax Appeals, requesting a redetermination of the deficiency determined in the aforesaid notice of deficiency. On January 9, 1935, the Commissioner filed an answer to the petition, and thereafter, on July 20, 1937, filed with the Board of Tax Appeals a motion for leave to file an amended answer claiming an increased deficiency in tax and on the same day lodged an amended answer. The motion to amend was granted July 24, 1937, and the amended answer filed. On September 1, 1937, the taxpayer filed his reply.

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On December 14, 1938, the Commissioner was granted leave to amend the amended answer, which amendment to the amended answer was filed on the same day.

This proceeding and the cases of Dorothy K. G. Rogers, Docket No. 84640 and Marjorie K. Campbell, Docket No. 84639, were heard on December 14, 1938, at Washington, D. C. On May 19, 1939, the Board entered its memorandum opinion, which was subsequently modified on June 1, 1939, by providing that the decision shall be entered under Rule 50, instead of in accordance with the notice of deficiency. On June 30, 1939, the Board entered its decision ordering and deciding that there is a deficiency in income tax for the year 1930 in the amount of $42,842.24.

III

NATURE OF THE CONTROVERSY

Seymour H. Knox, the father of the taxpayer died on May 16, 1915. His will provided that the residuary estate should be divided into four parts and that one part, consisting of 20 per cent of the whole, be placed in trust for this taxpayer. The will provided, with respect to the portion placed in trust for the taxpayer that it was so placed for the following uses and purposes:

"To receive, hold, and, from time to time, invest and reinvest the same, and, to collect the rents, income, issues,
90 and profits on the property from time to time constituting said trust fund and to pay over so much of the net income thereon as to my said trustees shall seem wise and proper toward the support, maintenance, and education of my son, Seymour H. Knox, until he shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during his minority for his benefit, and to pay over such accumulated income to him when he shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income on said trust fund until he shall arrive at the age of twenty-five (25) years, at which time, I give, devise, and bequeath to my said son, Seymour H. Knox, a portion of said trust fund, to wit, Five Hundred Thousand Dollars ($500,000.00), and direct my executors to pay over said sum of Five Hundred Thousand Dollars ($500,000.00) to my said son, Seymour H. Knox, and thereafter to pay over the net income on the trust fund remaining in their hands to my said son until he shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath one-half (½) of the trust fund then remaining in the hands of my said trustees to my said son, Seymour H. Knox, and I direct my said trustees to transfer and convey the same to him and thereafter to pay over the net income arising on the trust fund remaining in their hands to my said son, Seymour H. Knox, until he shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the balance of said trust fund unto my said son, Seymour H. Knox. In case of the death of my said son, Seymour H. Knox, prior to the time when he shall arrive at the age of thirty-five (35) years, I give, devise, and bequeath all of said trust fund which
91 may not then have been paid over to him, or to the possession of which he may not at the time of his death have been entitled, unto his issue, if any, him surviving, to be divided among them, share and share alike. And in the event that there be no issue him surviving, I give, devise, and bequeath the balance of said trust fund unto his heirs."

The will further provided that the trustees should have full power to sell, exchange, or dispose of any property in the trust fund, and expressed the wish of the testator that within five years after his death, or as soon thereafter as possible, 50 percent of the value of the trust fund should be invested in securities constituting legal investments for executors or trustees or in unencumbered real property.

The trust was formally set up on July 1, 1921, and the executors on that date transferred of record and delivered to the trustees the property as provided in the will. The trustees purchased 13,660 shares of stock of Marine Share Corporation on August 31, 1927, for $273,200.00 and on August 30, 1928, purchased 3,415 additional shares on rights for $102,450.00.

The taxpayer attained the age of thirty years on September 1, 1928, and thereupon on that date said trustees, pursuant to the terms of the aforementioned will, transferred of record and delivered to taxpayer certain securities and property including 5,160 of the original 13,660 shares and all of the 3,415 shares purchased by the trustees. The fair market value of those shares on that date was $473,768.75. The taxpayer exchanged those shares thereafter in a nontaxable exchange for 17,150 shares of capital stock of the Marine Union Investors, Inc., and sold the shares received in that exchange on June 10, 1930, for $287,193.67.

92 The Commissioner, in his determination of the deficiency, allowed the petitioner an ordinary loss of $186,575.08 on the sale. That loss was the difference between the amount realized and the fair market value of the Marine Share Corporation shares on September 1, 1928. The Commissioner in his amended answer claimed that the shares had a basis for gain or loss in the hands of the taxpayer equal to the cost of the shares to the trustees and that the taxpayer held the shares from the date of purchase by the trustees, so that he realized a capital gain of $79,293.58 on the sale of the shares acquired August 31, 1927, and an ordinary loss of $13,687.41 on the sale of the remainder acquired August 30, 1928.

The Board of Tax Appeals held that the taxpayer is entitled to use as his basis the fair market value of the property at the time it was delivered to him on September 1, 1928, relying upon the authority of Marjorie K. Campbell (1939) 39 B. T. A. No. 133 and cases therein cited. The Board held that the taxpayer acquired the personal property by the will of his father and not by specific bequest and that the third sentence of Section 113 (a) (5) of the Revenue Act of 1928 controls in determining the basis to be used in computing gain or loss.

The Board also held that the period of holding by the trustee should not be tacked on to the period that the property was held by the taxpayer for the purpose of determining whether it was a "capital asset" under the provisions of Section 101 (c) (8) of the Revenue Act of 1928, because the trustee was a different taxpayer and it had complete dominion and control over the property in question until the very moment it was delivered to the taxpayer on September 1, 1928, and that the taxpayer had

no dominion, control, or vested interest in the particular property until such date.

93 The Commissioner presents that the basis for gain or loss of the property received from the testamentary trust in the hands of the taxpayer is cost of the property to the trustees as provided by Section 113 (a) of the Revenue Act of 1928.

The Commissioner further presents that the property involved in the sale on June 10, 1930, represents property consisting of 10,320 shares of stock of the Marine Union Investor's, Inc., "held by the taxpayer for more than two years" as such phrase is used in Section 101 (c) (8) of the Revenue Act of 1928, and the gain on the disposition thereof should be computed at capital gain rates and that the gain or loss on the disposition of the remainder of said property consisting of 6,830 shares of stock of the same corporation held less than two years should be computed at ordinary rates. It is further presented that the Board's action on this question is in conflict with the principles underlying the action of the United States Supreme Court in the case of McFeely v. Commissioner (1935), 296 U. S. 102, in that if the property involved was "acquired * * * by will" as the Board held in connection therewith, it would follow that such property should be considered as "property held by the taxpayer" from the date of its acquisition by the trustees.

The questions presented are:

1. As to the securities purchased by the trustees with trust funds (subsequent to March 1, 1913), is the basis for determining gain or loss: (a) the cost to the trustees, or (b) the fair market value on the date of delivery by the trustees to the taxpayer?

2. For determining the period of holding by the taxpayer under Section 101 of the Revenue Act of 1928, is the period to

94 be computed: (a) from the date of purchase by the trustees as to the securities acquired with trust funds, or (b) the date of delivery by the trustees to the taxpayer?

3. Was the taxpayer's interest "vested" or "contingent" under the laws of New York?

III

ASSIGNMENTS OF ERRORS

That the Commissioner of Internal Revenue being aggrieved by the opinion and decision of the United States Board of Tax Appeals in these proceedings hereby petitions for a review of said opinion and decision by the United States Circuit Court of Appeals for the Second Circuit, and for the correction of the

manifest errors which therein occurred and intervened to his prejudice. The errors committed by the Board, which are relied upon by the Commissioner as the basis of this petition for review, are as follows:

The Board erred:

1. In holding and deciding that personal property delivered by trustees from the trust created by and in accordance with the will of taxpayer's father takes, as its basis for gain or loss in the hands of the taxpayer, its fair market value at the time of the delivery to the taxpayer by the trustees—regardless of whether the property was purchased by the trustees.

2. In failing to hold and decide, where personal property is purchased or acquired by testamentary trustees of a trust created by and in accordance with the will of taxpayer's father and said property is physically delivered to said taxpayer on
95 September 1, 1928, by the trustees, that the cost basis of said property for gain or loss in the hands of the taxpayer is the same as the cost basis to the testamentary trustees.

3. In holding and deciding that the basis for determining gain or loss of the personal property delivered by trustees from the trust created by and in accordance with the will of taxpayer's father is determined and governed by the third line of Section 113 (a) (5) of the Revenue Act of 1932.

4. In failing to hold and to decide that the basis for determining gain or loss of the personal property delivered by trustees from the trust created by and in accordance with the will of taxpayer's father is determined and governed by the first sentence of Section 113 (a) of the Revenue Act of 1928, where said property delivered by the trustees was acquired by the trustees.

5. In holding and deciding that the "time of distribution to the taxpayer" within the meaning of Section 113 (a) (5) of the Revenue Act of 1928 is the date the trustees delivered the property as provided in the will to the taxpayer, to wit, September 1, 1928.

6. In failing to hold and decide that the taxpayer realized gains and sustained losses on the disposition of the personal property physically received from the trustees on September 1, 1928, measured by the difference between the sales prices and bases claimed by the Commissioner on the respective properties disposed of in 1930.

7. In that the decision of the Board is contrary to the position of the Commissioner outlined in General Counsel's Memorandum 14893 (1935), C. B. XIV–1, p. 202.

96 8. In holding and deciding that the property received by the taxpayer from the trust on September 1, 1928, was

"held" within the meaning of Section 101 (c) (8) of the Revenue Act of 1928 by the taxpayer only from the date he physically received said property from the trustees.

9. In failing to hold and decide that the property received by the taxpayer from the trust on September 1, 1928, was "held" within the meaning of Section 101 (c) (8) of the Revenue Act of 1928 by the taxpayer from the date said property was purchased by the trustees.

10. In holding and deciding that the period of holding by the trustees should not be tacked on to the period that the securities were held by the taxpayer for the purpose of determining whether they were capital assets under the provisions of Section 101 (c) (8) of the Revenue Act of 1928.

11. In failing to hold and decide that the period of holding by the trustees should be tacked on the period that the securities were held by the taxpayer for the purpose of determining whether they were capital assets under the provisions of Section 101 (c) (8) of the Revenue Act of 1928.

12. In holding and deciding that 10,320 shares of Marine Union Investor's, Inc., stock sold on June 10, 1930, were not capital assets within the meaning of Section 101 (c) (8) of the Revenue Act of 1928.

13. In failing to hold and decide that 10,320 shares of Marine Union Investor's, Inc., stock sold on June 10, 1930, were capital assets within the meaning of Section 101 (c) (8) of the Revenue Act of 1928.

97 14. In holding and determining that the taxpayer sustained an ordinary loss in the amount of $186,375.08 on the sale on June 10, 1930, or 17,150 shares of stock of the Marine Union Investor's Inc., received in a non-taxable exchange for stock of the Marine Share Corporation purchased by the trustees of the testamentary trust and delivered to taxpayer on September 1, 1928, measured by the difference between the fair market value of the stock in the amount of $473,768.75 on the date received and the sales price of $287,193.67.

15. In failing to hold and determine that the taxpayer realized a capital gain of $79,293.38 on the sale on June 10, 1930, of 10,320 shares of stock of the Marine Union Investor's Inc., received in a non-taxable exchange for stock of the Marine Share Corporation purchased by the trustees of the testamentary trust and physically delivered to the taxpayer on September 1, 1928, measured by the difference between the cost of the shares to the trustees on August 31, 1927, and the sales price, and sustained an ordinary loss of $13,687.41 on 6,830 shares of stock of the Marine Union Investor's Inc., received in a non-taxable exchange for

stock of the Marine Share Corporation purchased by the trustees of the testamentary trust and physically delivered to the taxpayer on September 1, 1928, measured by the difference between the cost of the shares to the trustees on August 30, 1928, and the sales price.

16. In that its decision is contrary and in conflict with the principles underlying the action of the United States Supreme Court in the case of McFeely v. Commissioner (1935) 296 U. S. 102.

17. In that its conclusions of law are contrary to and in conflict with its findings of fact.

98 18. In finding and determining that there is only a deficiency in tax liability due from the taxpayer for the year 1930 in the amount of $42,842.24.

19. In failing to find and determine that there is a deficiency in tax liability due from the taxpayer for the year 1930 in the amount of $87,284.56.

Wherefore, the Commissioner petitions that said findings of fact and opinion and decision of the United States Board of Tax Appeals be reviewed by the Circuit Court of Appeals for the Second Circuit; that a transcript of the record be prepared in accordance with the law and the rules of said court and be transmitted to the Clerk of said court for filing and that appropriate action be taken to the end that the errors herein complained of may be reviewed and corrected by said court.

(Sgd.) SAMUEL O. CLARK, JR.,
Assistant Attorney General.

(Sgd.) J. P. WENCHEL
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
CLAUDE R. MARSHALL,
Special Attorney,
Bureau of Internal Revenue.

99 UNITED STATES OF AMERICA,
District of Columbia, ss.:

Claude R. Marshall, being duly sworn, says that he is a Special Attorney in the Bureau of Internal Revenue and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the

matters therein alleged on information and belief, and as to those matters he believes it to be true.

(Sgd.) CLAUDE R. MARSHALL.
Claude R. Marshall.

Sworn and subscribed to before me this 20th day of September 1939.

(Sgd.) GEORGE W. KREIS,
Notary Public.

My commission expires Nov. 15, 1942.

100 In United States Circuit Court of Appeals for the Second Circuit

BTA Docket No. 77827

[Same title.]

Notice of filing petition for review

Filed Sept. 30, 1939

To Mr. SEYMOUR H. KNOX,
2100 Rand Building, Buffalo, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 22nd day of September 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22nd day of September 1939.

(Sgd.) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

101 Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 26th day of September 1939.

(Sgd.) SEYMOUR H. KNOX,
Attorney for Respondent on Review.

CRM/csl.
9/13/39.

102 In United States Circuit Court of Appeals for the Second Circuit

[Same title.] BTA Docket No. 77827

Notice of filing petition for review

Filed Sept. 30, 1939

To JOHN L. KENEFICK, Esq.,
1330 Marine Trust Building, Buffalo, New York:

You are hereby notified that the Commissioner of Internal Revenue did, on the 22d day of September 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22d day of September 1939.

(Sgd.) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

103 Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 25th day of September 1939.

(Sgd.) JOHN L. KENEFICK,
Attorney for Respondent on Review.

CRM/csl.
9/13/39.

104 In United States Circuit Court of Appeals for the Second Circuit

BTA Docket No. 77827

[Same title.]

Notice of filing petition for review

Filed Sept. 30, 1939

To RALPH M. ANDREWS, Esq.,
1330 Marine Trust Building, Buffalo, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 22 day of September 1939, file with the Clerk

of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22 day of September 1939.

(Sgd.) J. P. WENCHELL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

105 Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 25 day of September 1939.

(Sgd.) RALPH M. ANDREWS,
Attorney for Respondent on Review.

CRM/csl.
9/13/39.

106 In United States Circuit Court of Appeals for the Second Circuit

BTA Docket No. 77827

[Same title.]

Notice of filing petition for review

Filed Sept. 30, 1939

To ERNEST J. BROWN, Esq.,
1330 Marine Trust Building, Buffalo, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 22 day of September 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22 day of September 1939.

(Sgd.) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 25th day of September 1939.

(Sgd.) ERNEST J. BROWN,
Attorney for Respondent on Review.

CRM/csl.
9/13/39.

In United States Circuit Court of Appeals for the Second Circuit

BTA Docket No. 77827

[Same title.]

Amended praecipe for record

Filed Oct. 21, 1939

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Second Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.
2. Pleadings before the Board:
(a) Petition, including annexed copy of deficiency letter.
(b) Answer.
(c) Amended answer.
(d) Reply to amended answer.
(e) Amendment to amended answer.
(f) Reply to Answer to Amendments of Petition.
3. Stipulation of Facts and Exhibit A attached thereto.
4. Respondent's Exhibit A (Decree).
5. Memorandum opinion of the Board.
6. Decision.
7. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.
8. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record.
9. This praecipe (amended).

Said transcript to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit.

(Sgd.) J. P. WENCHEL,
R. L. W.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Receipt of a copy of the above-described amended praecipe for record is acknowledged and agreed to this — day of October 1939.

(Sgd.) JOHN L. KENEFICK,
Attorney for Respondent on Review.

CRM/esl 10/17/39.

(Sgd.) RALPH M. ANDREWS,
(Sgd.) ERNEST J. BROWN,
Attorneys for Respondent on Review.

110 [Clerk's certificate to foregoing transcript omitted in printing.]

111 In United States Circuit Court of Appeals For the Second Circuit

Nos. 41-257-258-259—October Term, 1939

(Argued February 15, 1940. Decided June 10, 1940)

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

RICHARD VAN NEST GAMBRILL, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

MARJORIE K. CAMPBELL, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

SEYMOUR H. KNOX, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

DOROTHY K. G. ROGERS, RESPONDENT

112 Petitions by the Commissioner of Internal Revenue to review determinations of the United States Board of Tax

Appeals in respect to income taxes of the respondents Gambrill and Knox for the year 1930, and of the respondents Campbell and Rogers for the year 1933. Affirmed.

Before SWAN, AUGUSTUS N. HAND, and PATTERSON, Circuit Judges.

Sewall Key, Acting Assistant Attorney General, J. L. Monarch and Newton K. Fox, Special Assistants to the Attorney General, Counsel for the Commissioner of Internal Revenue in the proceeding against the respondent Gambrill. Samuel O. Clark, Assistant Attorney General, Sewall Key and Arthur A. Armstrong, Special Assistants to the Attorney General, Counsel for the Commisssioner of Internal Revenue in the proceedings against the respondents Campbell, Knox and Rogers. Sidney W. Davidson, Ben R. Clark, and Allin H. Pierce, Counsel for the respondent Gambrill. James McCormick Mitchell, John L. Kenefick, and Ralph M. Andrews, Counsel for the respondents Campbell, Knox and Rogers.

Opinion

113 AUGUSTUS N. HAND, *Circuit Judge:*

The foregoing proceedings all involve the correctness of income tax assessments by the Commissioner of Internal Revenue, and in each the Commissioner has appealed from decisions of the Board of Tax Appeals modifying his assessments.

In the Gambrill case the Commissioner assessed an income tax deficiency of $11,753.40 for the year 1930, while the Board of Tax Appeals determined that there was an overpayment of $75.60 by the taxpayer. In the Knox case the Commissioner assessed a deficiency for the same year of $35,645.83, while the Board determined that there was a deficiency of $42,842 (arising, however, from adjustments not here in issue). In the Campbell case the Commissioner assessed an income tax deficiency of $86,937.47 for the year 1933, and in the Rogers case a deficiency of $65,549.60 for the same year. The Board found that there was no income tax deficiency on the part of either Campbell or Rogers. We think that its orders in all four proceedings should be affirmed.

In each of the above cases the taxpayer involved was given a remainder interest in a trust created by will. Certain personal securities that were a part of the corpus of the particular trust were delivered by the trustee to the taxpayer after the right to possession became fixed by the termination of the prior beneficial estate. Some of these securities were acquired by the testator during his lifetime, some of them were purchased by the executor after the testator's death before setting up the trust, and some were purchased by the trustee after the trust was established.

Securities derived by the trustee in the various ways mentioned were delivered by him to the taxpayer and sold by the latter.

114 In assessing income taxes upon alleged profits realized by the taxpayer the Commissioner used the following bases for computing gains: In the case of securities which had been owned by the decedent, their fair market value at the time when distributed by the executor to the trustee; in the case of securities purchased by the executor or trustee, the cost to such fiduciary; in respect to certain securities purchased by a fiduciary prior to March 1, 1913, as in Gambrill's case, the value on that date, whenever cost was unknown. The Board of Tax Appeals, however, took the view that, because of the provisions of Section 113 (a) (5) of the Revenue Acts of 1928 and 1932, the proper basis in all cases was the fair market value of the securities at the "time of the distribution to the taxpayer" by the trustee, no matter when or how the trustee or the executor might have derived the particular securities.

In determining how long a taxpayer had held securities for the purpose of computing capital gain or loss under Section 101 of the Revenue Act of 1928, the Board used the dates of delivery of the securities by the trustee to the taxpayer. The Commissioner, on the other hand, used the date of the death of the testator as the beginning of the period of holding securities owned by the latter and the date of purchase by the fiduciary as the beginning in cases where securities were purchased by the executor or trustee.

We agree with the conclusion of the Board that Sections 113 (a) (5) of the Revenue Acts of 1928 and 1932 govern the computation of loss or gain in the cases before us. The pertinent provisions read as follows:

"(a) Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

* * * * *

115 "(5) Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the

fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death; * * *"

None of the securities involved in the cases before us were acquired "by specific bequest" or were "acquired by the decedent's estate from the decedent." They were all directly acquired from testamentary trustees. Accordingly the basis was not "the fair market value of the property at the time of the death of the decedent." Therefore the third clause of Section 113 (a) (5) which embraces "all other cases" of property acquired by will is controlling. That clause provides that: "In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer."

116 The words "the property" in the foregoing sentence seem inevitably to relate to the particular property sold by the taxpayer to whom it was distributed by the trustee. The term "taxpayer" is defined by Section 701 (a) (13) of the Revenue Acts of 1928 and 1932 as "any person subject to a tax imposed by this Act." It is hard to imagine language which would more clearly fix the basis for computing the gain or loss realized upon the sales of the securities with which the Commissioner had to deal than the words "fair market value of the property at the time of the distribution to the taxpayer."

Perhaps the most strenuous objection made by the Commissioner to adopting what seems to be the clear meaning of the statute is that increment in value between the date of the decedent's death and the time of distribution to the taxpayer is not subjected to taxation when the securities are sold and thus tax resources are impaired. But it is frequently true that increments are not subjected to taxation. One common case where increment in value is disregarded is that which occurs during the lifetime of an owner of securities which are not sold by him but are sold after his death by his executors, administrators, trustees, or remaindermen under his will. Such an increment accruing during the lifetime of the owner of securities has never been taken into account in computing gain or loss upon sales after his death. Increment between the date of death of the owner of securities and the date of distribution by an executor to a legatee is also to

be disregarded under the third clause of Section 113 (a) (5) in the case of distribution of securities which are transmitted by virtue of a general bequest.

The supposed loss in revenue due to a disregard of fluctuations in the market value of securities between the date of death
117 and the time of distribution is moreover somewhat fanciful, for in all cases where the property depreciates in value between the date of death and the date of distribution a larger tax would result from fixing the basic value at "the time of the distribution to the taxpayer" than from fixing the basis at the time of the testator's death.

The further contention of the Commissioner that the word "taxpayer" as used in the third clause of Section 113 (a) (5) should be construed as meaning the "trustee" and that the phrase "time of the distribution to the taxpayer" ought to be interpreted as meaning "the date when the executors transferred the property to the trustees," seems to us without warrant. The taxpayers here are undoubtedly the respondents. The trustees are separate entities and as such are neither agents of the respondents nor mere passive fiduciaries. It is true that under certain circumstances they might themselves have become taxpayers in respect to the corpus of their trusts, but only in case they had made sales of some of the securities composing the corpus—not, as here, when without making any sales they wound up their trusts and distributed the corpus to remaindermen. To treat the trustee and beneficiary-remaindermen, as the Commissioner wishes us to do, as a "sort of dual tax personality" is to disregard the plain language of the statute and to adopt a concept which seems to us to defy analysis. In view of the clear terms of the third clause of Section 113 (a) (5) it can make no difference whether the interests of any remaindermen be vested, vested subject to be divested, or contingent. In either event the basis should be "the fair market value at the time of the distribution to the taxpayer", i. e., to the respondent whose income taxes are being reviewed, and not to the trustee.

In respect to the securities purchased either by the executors or trustees the Commissioner says they do not come within the third clause of Section 113 (a) (5) because they were not acquired by will. This requires a most technical interpre-
118 tation of the clause and one that in our opinion is not sound even technically. Any property distributed by a trustee which is part of the corpus of the trust is acquired through and by virtue of the will. Through the will the remaindermen derived all their interests and without it they would have had no standing and would have received nothing. Lyeth v. Hoey, 305 U. S. 188, 194–195.

It is further argued that the Senate Report in respect to the enactment of Section 113 (a) (5) in the 1928 Act justified the Commissioner's interpretation of the statute. In dealing with the third clause the report said: "It would also apply in cases where the executor purchases property and distributes it to the beneficiary." There is, however, no reason because of this mention of purchases by the executor for limiting the application of the report to property so purchased. In cases where a trust has been created by will the executor will often act as trustee before the trust is actually set up and sometimes will sell and purchase securities on behalf of the trust. Indeed the statement in the Senate Report would not cover the particular facts before us except in situations where the executor so acted.

The Commissioner apparently contends that the decision in Brewster v. Gage, 280 U. S. 327, fixing the date of death as the time when property should be valued under the provisions of the Revenue Act of 1921, for the purposes of computing gain or loss, affords some guide in interpreting Section 113 (a) (5). The difficulty in maintaining such a contention is that Section 113 (a) (5) is specific, that it fixes a different date for valuing acquisitions of property from that of the Act of 1921, and that the opinion in Brewster v. Gage says at page 337: "The deliberate selection of language so different from that used in the earlier acts indicates that a change of law was intended."

In the United States v. Nostrand, 94 F. (2d) 510, and Commissioner v. Libbey, 100 F. (2d) 458, the Court of Appeals
119 of the First Circuit held that the basis for computing gain or loss to the taxpayer was the market value of the property at the time of distribution by the trustee to the remaindermen, and not the value at the time of distribution by the executor to the trustees. These decisions, rather than that of the Seventh Circuit in Commissioner v. Maguire rendered on March 5, 1940, are in accord with our view.

The second question is whether the securities passing to the respondents Gambrill and Knox were held by them for more than two years and hence whether any gain or loss realized by the sale was taxable not as ordinary income or loss but as a capital gain or loss because the securities were "capital assets" as defined in Section 101 (c) (8) and (B) of the Revenue Act of 1928. The Board held that they were not, and they plainly were not unless the period during which they were held by the trustees can be added to the period between the date of distribution to the taxpayers and the date of sale. There cannot be any such tacking because the property, when held by the respective respondents, did not have "for the purpose of determining gain or loss

from a sale * * *, the same basis * * * in his hands as it would have in the hands" of the trustees.

On behalf of the Commissioner it is argued that the decision of the Supreme Court in McFeeley v. Commissioner, 296 U. S. 102, requires us to find that the securities had been held from the date of death and that they, therefore, were held for more than two years prior to sale. That decision, however, involved an estate where there was no trust. The court only decided that the general legatee held the securities which were transferred to him by the executor from the date of death. We agree with the Board that the intervening trusts broke the continuity so that the taxpayer only held the securities from the time they were distributed to him.

120 In the Campbell case certain Woolworth stock was purchased by the taxpayer prior to distribution to her by the trustee of other shares of the same kind. If she did not hold the shares she acquired under the will until they were distributed to her by the trustee, under the "first-in-first-out" rule, her own shares should be treated as sold prior to those which were delivered to her by the trustee. We agree with the Board that her own shares must be regarded as sold first. During the time that the title to the shares remained in the trustee the taxpayer had no control over their disposition and they were not acquired until she obtained them as her own. Helvering v. San Joaquin Fruit & Investment Co., 297 U. S. 496.

The orders of the Board of Tax Appeals are affirmed.

121 In United States Circuit Court of Appeals, Second Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

v.

SEYMOUR H. KNOX, RESPONDENT

Appeal from the United States Board of Tax Appeals

Judgment

Filed June 29, 1940

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

D. E. ROBERTS, *Clerk.*

122 [File endorsement omitted.]

123 [Clerk's certificate to foregoing transcript omitted in printing.]

124 Supreme Court of the United States

Order allowing certiorari

Filed November 12, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1941

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